Supreme Court, U.S.
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No.

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1991

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, Individually and d/b/a GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

* HAROLD N. HILL, JR.
HURT, RICHARDSON, GARNER, TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Petitioner

* Counsel of Record

Of Counsel:

MEADE BURNS
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

QUESTIONS PRESENTED

(1) Whether, in reaffirming an award of punitive damages in the sum of $1.3 million, the Supreme Court of Georgia complied with the mandate of this Court to reconsider its affirmance of that award in light of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. (1991), or whether that court decided this federal question in a way that conflicts with an applicable decision of this Court, namely *Pacific Mutual v. Haslip*.

(2) Whether Official Code of Georgia Annotated Section 51-12-5 (1982), which authorizes punitive damages to be awarded in tort actions "in which there are aggravating circumstances, in either the act or the intention," violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment, in that, among other things:

(a) It fails to provide adequate notice of the conduct for which punitive damages may be allowed;

(b) It fails to set forth any clear, constitutionally acceptable standards for juries to apply in determining whether to award punitive damages;

(c) It fails to set forth any clear, constitutionally acceptable standards for juries to apply in determining the amount of such damages; and

(d) It fails to protect defendants subject to punitive damages in civil cases in a manner constitutionally consistent with the protections provided under the criminal laws to criminal defendants subject to fines (e.g., notice of the prohibited conduct, upper limit of

criminal fine specified by law, protection against double jeopardy).*

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* All parties to this case are named in the caption except Metro Ambulance Services, Inc., the owner/operator of the helicopter which crashed. Metro Ambulance Services, Inc., paid $10,001 ($5,001 nominal and $5,000 punitive damages) into the registry of the trial court and did not appeal to the Supreme Court of Georgia from the trial court's judgment. It, therefore, has no interest in the outcome of this petition. Metro Ambulance Services, Inc., has, however, been given notice pursuant to Rule 29.3. Because 28 U.S.C. § 2403(b) may be applicable to this case, the Attorney General of Georgia has also been served with copies of this Petition.

Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of petitioner: the Gwinnett Hospital System Foundation, Inc., and its subsidiary, Gwinnett Service Corporation, Inc.

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R. STANFORD JONES, Administrator of the Estate
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

This is the second appearance of this case before this Court.

The petitioner, the Hospital Authority of Gwinnett County, Georgia, individually, and d/b/a Gwinnett Ambulance Services, respectfully petitions the Court for writ of certiorari to review the judgment and opinion of the Supreme Court of Georgia entered on October 18, 1991 (reconsideration denied, November 1, 1991), following the remand of this case from this Court to the Supreme Court of Georgia (see No. 89-1315) for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. (1991).

Opinions Below

The opinion of the Supreme Court of Georgia following remand is reported at 261 Ga. 613, 409 SE2d 501 (1991), and is reproduced in the Appendix, beginning at A.1. The order denying reconsideration of that opinion appears in the Appendix at A.6.

The original opinion of the Supreme Court of Georgia, as to which this Court granted certiorari and remanded in No. 89-1315, is reported at 259 Ga. 759, 386 S.E.2d 120 (1989), and is reproduced in the Appendix beginning at A.7. The order denying reconsideration of that opinion appears in the Appendix at A.19. The judgment of the State Court of Cobb County dated September 27, 1988, is unreported but is reproduced in the Appendix at A.20.

Jurisdictional Statement

This Court's jurisdiction over this case was recognized in *Hospital Authority of Gwinnett County, Georgia, v. R. Stanford Jones*, No. 89-1315, 499 U.S. (1991). It has never been questioned. Moreover, this Court has jurisdiction to enforce its orders, particularly its order entered March 18, 1991, remanding this case for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. (1991).

The judgment and opinion sought to be reviewed were rendered by the Supreme Court of Georgia on October 18, 1991. That court subsequently denied petitioner's motion for reconsideration on November 1, 1991.

Jurisdiction to review the decision of the Supreme Court of Georgia by writ of certiorari is conferred upon this Court pursuant to 28 U.S.C. § 1257(a). This petition for writ of certiorari is filed within ninety days of the denial of petitioner's motion for reconsideration by the Supreme Court of Georgia, as allowed under 28 U.S.C. § 2101(c) and Rule 13.4 of the Supreme Court Rules.

Constitutional and Statutory Provisions Involved

This suit challenges the constitutionality of Section 51-12-5 of the Official Code of Georgia Annotated (1982) (O.C.G.A.) which provided, at all times pertinent to this appeal, as follows:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

In addition, this case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution, which provide in pertinent part as follows:

> [N]or shall any State deprive any person of ... property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

1. *Summary of the Case.*

Petitioner seeks review on writ of certiorari of its contention that a judgment imposing $1,300,000 in punitive damages pursuant to O.C.G.A. § 51-12-5, *supra*, accompanied only by "nominal" damages ($5,001.00, levied jointly against petitioner and a co-defendant), has deprived and will deprive petitioner of substantial rights guaranteed by the Due Process Clause of the Fourteenth Amendment as recognized in *Pacific Mutual Life Insurance Co. v. Haslip, supra.*

The constitutionality of the Georgia statute governing punitive damages and the $1.3 million punitive damages award entered in this case were properly raised in the courts of Georgia and were expressly reviewed and considered by the Supreme Court of Georgia in its decisions below (Appendix at A.1, A.7 at 17-18). In those decisions,

the court below upheld the Georgia statute and the punitive damages award in the face of petitioner's constitutional challenges.

2. *Presentation of Issues in the State Courts*

Petitioner's constitutional arguments were raised throughout the course of this case, beginning in the trial court as early as its amendment to answer and defenses (R.60-64, set forth in the Appendix, at A.22). Petitioner's pre-trial motion to dismiss or strike plaintiff's claim for punitive damages on the constitutional grounds (A.26) was overruled by the trial court (A.30). Nevertheless, petitioner incorporated all of its constitutional arguments when it moved for directed verdict at trial (A.32), and, in addition, objected to all the court's jury charges as to punitive damages (A.35). Following the jury's award of $5001 in nominal damages and $1.3 million in punitive damages, petitioner renewed its constitutional arguments in its motion for judgment notwithstanding the verdict or for new trial (A.36), which the trial court overruled notwithstanding the disparate amounts involved (A.41).

Petitioner's appeal to the Supreme Court of Georgia enumerated as error that Georgia's punitive damages statute, O.C.G.A. § 51-12-5, *supra*, and the award in this case were unconstitutional as a denial of due process and equal protection under the U.S. Constitution (A.43). The Supreme Court of Georgia in its 1989 opinion specifically confronted the issue of whether the Georgia statute was constitutional under the Equal Protection and Due Process Clauses of the state and federal constitutions and upheld both the statute and the excessive award in this case as constitutional. *See Hospital Authority of Gwinnett County v. Jones, supra* (A.12-18).

The constitutionality of the Georgia statute under the Due Process and Equal Protection Clauses and the award entered in this case were, as demonstrated above, raised in the trial court. The constitutional issues were also recognized and determined by the highest court of the

state in its original opinion in this case and again in its opinion on remand. The federal question was, therefore, timely and properly raised so as to give this Court jurisdiction to review the judgment below.

3. *Material Facts.*

The facts material to this case, including all those relied upon by the Georgia Supreme Court, are as follows:

William H. O'Kelley, deceased, was mortally burned in a head-on car/truck collision in Gwinnett County, Georgia. Ambulances and a helicopter were called.

The senior EMT in charge at the scene, Ms. Beth Burgess, was an employee of Gwinnett Ambulance Services operated by the Hospital Authority of Gwinnett County. Mr. O'Kelley was placed in an ambulance, where Ms. Burgess examined his burns. After she attempted unsuccessfully to begin an IV, she decided to transport Mr. O'Kelley by ambulance to the closest hospital, Joan Glancy Hospital (operated by the Hospital Authority) (T. 317-318).

While the co-defendant's helicopter was in route to the accident site, the supervisor of Gwinnett Ambulance Services directed the emergency technicians at the scene to transport the patient to Joan Glancy Hospital, which was less than two miles from the accident scene (T. 15), and had on staff two physicians with significant training and experience in treating burn patients. One of these physicians, Dr. Gaskins, who was monitoring EMT radio transmissions, agreed with the decision to transport the patient to Joan Glancy (T. 549).

The helicopter was still about two to three minutes away when the ambulance left the scene for the trip to the hospital, which took about four minutes (T. 81, 91). The helicopter proceeded to Joan Glancy Hospital, where it landed safely in the parking lot.

Plaintiff introduced the testimony of a Gwinnett Fire Department dispatcher who testified to instances when a patient was not taken to the nearest emergency room (as was done here) but instead to one of the Hospital Authority's institutions. He further testified that the reason for bypassing nearer hospitals was to "provide more services to the county." (A.8.)

At the Joan Glancy emergency room, Mr. O'Kelley was treated and stabilized by Drs. Gaskins and Mason (the two experienced physicians referred to above), by the establishment of IV lines which the EMT had been unsuccessful in starting in the ambulance, administration of morphine, and placement of a respiratory tube in the patient's throat after he complained of shortness of breath about an hour after reaching the hospital.

Due to the severity of his injuries, the patient's chances of survival were about 1%. After being examined and x-rayed for the possibility of other injuries, about an hour and a half after arriving O'Kelley was strapped into a stretcher and loaded onto the helicopter, which was owned by a co-defendant, for evacuation to a hospital with a "burn unit" specializing in treatment of severely burned patients.

On lift-off from the hospital parking lot, the co-defendant's helicopter hit a light pole and crashed. Experts testified at trial that the accident was caused by "gross pilot error" (A.8; 259 Ga. at 760), not only for flying into the pole, but also because the water/alcohol tank, which may have been necessary to give added power to the helicopter engine for assent from such a confined space, was empty (Id.).

Incredibly, O'Kelley was only slightly injured, if at all, in the helicopter crash. After being re-examined at Joan Glancy emergency room, O'Kelley was then transported by ambulance to Grady Hospital's burn unit in Atlanta, where he died six days later as the result of his burns. The bill for services from Joan Glancy Hospital was $1,216.26.

The Administrator of O'Kelley's estate sued the owner of the helicopter and the Hospital Authority for nominal and punitive damages, but no claim for actual damages for personal injury or wrongful death was asserted. The driver of the car which caused the head-on collision and her employer were also sued in separate suits (A.7).

Plaintiff's counsel contended that punitive damages were warranted because the Hospital Authority allegedly was motivated by profit, rather than patient care, in taking Mr. O'Kelley to one of its hospitals, and the Hospital Authority failed to maintain a proper helicopter landing area. In its first opinion, however, the Supreme Court of Georgia observed that generally punitive damages are not authorized for non-performance of a duty and did not base its decision on the alleged failure to provide a proper landing area (A.11, n.7; 259 Ga. at 761, n. 7). (Thus it should be noted that petitioner's alleged conduct justifying punitive damages was not the proximate cause of the helicopter crash.)

The jury awarded O'Kelley's estate nominal damages of $5,001 against the Hospital Authority and the helicopter owner, jointly. Although the jury awarded punitive damages of $5,000 against the owner of the helicopter, it awarded $1.3 million in punitive damages against the Hospital Authority.

The Supreme Court of Georgia affirmed, but on petition for certiorari this Court vacated that judgment and remanded the case for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip, supra. Hospital Authority of Gwinnett County v. Jones*, No. 89-1315, *supra*.

Argument: Reasons for Granting the Writ

1. *The Court Below Did Not Apply Pacific Mutual v. Haslip As Directed By This Court.*

This is one of several cases decided last March in which the Court granted certiorari, vacated the judgment and remanded for further consideration in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. (1991).

On remand, the Supreme Court of Georgia misread this Court's *Haslip* decision. In *Haslip*, the Court found that the common law scheme for the allowance of punitive damages was not so inherently unfair as to be *per se* unconstitutional (111 S.Ct. at 1043). However, the Court went on to conclude that the punitive damages award in a particular case could be so excessive as to deprive a person of property without due process, but that under the procedures being utilized in Alabama the award in *Haslip* did not violate due process.

Of crucial significance here, however, this Court found that "The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages" (111 S.Ct. at 1045).

Unlike Alabama, Georgia's post-verdict review does not ensure that punitive damages awards have some understandable relationship to compensatory damages. On the contrary, in its prior opinion in this case the Supreme Court of Georgia acknowledged that "this award appears to bear no rational relationship to the extent of the injury . . .", saying that lack of such rational relationship was of "no consequence", and holding that the "concept of proportionality as a legal limitation on the amount of punitive damages" is inapplicable in Georgia when such damages are awarded for deterrence (A.11; 259 Ga. at 762).

Notwithstanding this Court's determination that punitive damage awards must have some understandable relationship to compensatory damages, on remand the Georgia Supreme Court disagreed, saying "... we reject[ ] the notion that punitive damages must necessarily bear some relationship to the *actual* damages awarded by the jury." (A.2) (The phrases "compensatory damages" and "actual damages" have the same meaning.)

The Georgia court found that comparing the punitive award to the actual award was not mandated by this Court in *Haslip* because this Court there approved the Alabama review standards which include "whether there is a reasonable relationship between the punitive damages award and harm likely to result from the defendant's conduct as well as the harm that actually has occurred" (A.2 quoting from *Haslip*, 111 S.Ct. at 1045). Because in another case the defendant's alleged policy of bypassing emergency care at nearby hospitals could result in great harm to a patient, the Georgia court found that although the "actual harm to O'Kelley was slight ... the potential harm to patients in other circumstances supports the punitive damages award here" (A.2-3).

The Supreme Court of Georgia elected to adopt this Court's description of the Alabama review standard rather than to apply this Court's holding as to what is required for such review to be constitutional.

We respectfully submit that the rule adopted by this Court (comparison of punitive damages to compensatory damages) is constitutionally superior to the rule adopted by the Georgia court (comparison of punitive damages to actual or likely harm), because when compensatory damages are small a person can imagine much greater "harm likely to result" and therefore punitive damages are limited only by the imagination of the reviewing court, or

the jury as inspired by plaintiff's counsel, contrary to the requirements of due process.[1]

That this Court adopted actual harm or compensatory damages as the standard of comparison (rather than likely harm) is made clear not only by what this Court said (111 S.Ct. at 1045), but by the comparison it made (111 S.Ct. at 1046):

> We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, [and] is more than 200 times the out-of-pocket expenses of respondent Haslip . . . .

The Court did not consider the "likely harm" which could have occurred in Haslip; instead, it considered the compensatory damages awarded.

In the case at bar, the punitive damages are 260 times the nominal damages awarded to Mr. O'Kelley's estate[2] and are 1,069 times the hospital's bill for services (which may be compared to Ms. Haslip's out-of-pocket expenses).

In *Haslip* this Court went on to say (111 S.Ct. 1046):

> While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria.

Certainly, 260 to 1 (or 1,069 to 1) is over the line, and $1.3 million in punitive damages is unconstitutional.

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[1]According to a recent review of state law in 2 L. Schlueter and K. Redden, *Punitive Damages*, Ch. 18, 167 et seq. (2d ed. 1989), like this Court, courts in the following states have held that the amount of punitive damages must bear a reasonable relationship to the actual damages awarded, or to the injury, or words to that effect: Arizona (id. 170), Arkansas (id. 172), Delaware (id. 182), Iowa (id. 195), Kentucky (id. 198), Missouri (id. 220), New Jersey (id. 232), Pennsylvania (id. 248) and Utah (id. 263).

[2]If the fact that the nominal damages were awarded against two defendants is taken into account, the punitive damages awarded against petitioner are 520 times the nominal damages.

The thrust of *Haslip* is clear. In order to be constitutional, punitive damages must be reasonable. "We can say, however, that general concerns of reasonableness . . . enter into the constitutional calculus" (111 S.Ct. at 1043). "As long as the [jury's] discretion is exercised within reasonable constraints, due process is satisfied" (111 S.Ct. at 1044). "This appellate review makes certain that punitive damages are reasonable in their amount . . ." (111 S.Ct. at 1045). "The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter" (111 S.Ct. at 1045-1046).

Punitive damages in a given case are reasonable, and hence constitutional, if they ". . . are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Haslip*, 111 S.Ct. at 1045. On the other hand, punitive damages which are not the proximate cause of any injury and have no understandable relationship to compensatory damages are unreasonable and hence unconstitutional, *Haslip*, regardless of the "harm likely to result" from similar conduct in another case.

The Supreme Court of Georgia considers whether there is a rational relationship between actual damages and punitive damages in some cases, and sets those awards aside. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 123; 365 S.E.2d 827, 833 (1988); *WMH, Inc. v. Thomas*, 260 Ga. 654, 656, 398 S.E.2d 196, 198 (1990). See how the Georgia court distinguished *Colonial Pipeline* at A.2. In other cases, to wit: this case, it refuses to consider actual damages, preferring instead to consider "likely harm".

That leaves that court free to disapprove some punitive damages awards, and approve others, but that system of review is utterly lacking in rationality and is therefore unconstitutional.

In addition to the foregoing, in *Haslip*, this Court found that, in order for an award of punitive damages to

be constitutional, it must be subjected to certain procedural protections, including post-verdict review by the trial and appellate courts to ensure that the award is not greater than reasonably necessary to punish and deter (111 S.Ct. at 1045-1046).

Nevertheless the Georgia court in this case said (A.3) "... it is clear that the Alabama post-trial review by both trial and appellate court is more structured" than in Georgia. That court then noted (A.3) that "... no Georgia courts, trial or appellate, ... have reviewed ..." this verdict in light of the Alabama factors.[3]

That is to say, the Supreme Court of Georgia declined to reconsider its earlier decision in light of *Haslip*, as this Court directed in its remand order. Its explanation for declining to make such review is as follows (A.4):

> Of what benefit, then, is scrutiny of those elements by the reviewing courts? Any review of them in an effort to ensure that punitive awards are not grossly out of proportion to the conduct and the ensuing damages would be entirely a matter of conjecture or, at least, a matter of opinion based on extraneous factors.

It may be correct to say that comparison of punitive damages to "likely harm", as utilized by the court below, would be a matter of conjecture or a matter of opinion based on extraneous factors. However, the Supreme Court of Georgia was directed to review this award in light of *Haslip*, not to conclude that such review is unnecessary as being conjectural.

The Georgia court did not review its earlier decision as required by this Court's remand order and certiorari should be granted to review its decision for both of the foregoing reasons.

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[3]Clearly the trial court has not reviewed this verdict in light of *Haslip* because the Georgia Supreme Court found such review to be unnecessary.

2. *Georgia's Punitive Damages Statute Denies Defendants Due Process And Equal Protection Of Law.*

O.C.G.A. § 51-12-5, the Georgia statute on which the punitive damages award in this case was based, deprives civil defendants of due process and equal protection of law.

O.C.G.A. § 51-12-5 authorizes punitive damages in a tort action of any type, and was the only statutory authority for general punitive damages in Georgia at the time of Mr. O'Kelley's accident.[4] It provides as follows:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

Thus, under this statute, a jury is authorized to award punitive damages in any tort case in which there are "aggravating circumstances, in either the act or the intention." Recognizing that the phrase "aggravating circumstances, in either the act or the intention" is vague and indefinite and provides no notice of the proscribed conduct, the Georgia courts have, in effect, defined "aggravating circumstances" as willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to the consequences. *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 148-149, 45 S.E. 1000 (1903); *Kaplan v. Sanders*, 237 Ga. 132, 134, 227 S.E.2d 38, 39 (1976); *General Refractories Co. v. Rogers*, 240 Ga. 228, 230, 239 S.E.2d 795, 798 (1977). *See also* A.10.

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[4]The Georgia law regarding punitive damages was amended, effective July 1, 1987, to add a new statute governing punitive damages. O.C.G.A. § 51-12-5.1 now governs punitive damages in all causes of action occurring after July 1, 1987. The new statute places a "cap" on punitive damages in some cases, requires proof by "clear and convincing" evidence, and effects certain other changes in the law, as well.

However, these additional words are themselves vague and indefinite and provide very little guidance as to the conduct prohibited. For example, " 'Malice', as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings." *Smith v. Wade*, 461 U.S. 30, 39 fn. 8 (1983). The passage of time has not clarified the meaning of malice.

Moreover, in this case the clarity and specificity of the words and phrases used to define "aggravating circumstances" is to be measured by the least clear and least specific of such words and phrases. The phrase "that entire want of care which would raise the presumption of a conscious indifference to consequences" is most unclear and indefinite, if not meaningless, to a jury. It was that supposedly clarifying expression which was directly involved here, as demonstrated by the trial court's charge to the jury.[5]

Unlike the words "willful misconduct," which connote some intentional, affirmative, yet unacceptable act, the words "entire want of care" may connote nothing more than a failure to act, which failure may be a general failure to take any action to prevent an occurrence (an "across the board" failure to act, so to speak), or may be a failure to take any action to prevent the particular cause of an occurrence (a complete, yet particularized, failure

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[5]The trial court charged the jury, in pertinent part, as follows:

> "Now, it is not essential to recover for punitive damages that the person inflicting the damage was guilty of willful and intentional misconduct. It is sufficient that the act be done under such circumstances as evidences an entire want of care and conscious indifference to the consequences."

The complete explanation of the court regarding punitive damages is set forth in the Appendix, *infra*, at A.33-34.

to act). Neither the statutes nor the cases resolve this ambiguity.[6]

The punitive damages statute applied in this case, O.C.G.A. § 51-12-5, *supra*, violates the Due Process Clause in that it permits awards of excessive punitive damages which are unreasonable in amount and irrational in light of their purpose to punish and deter. *Haslip*, *supra*. In addition, O.C.G.A. § 51-12-5, *supra*, violates the Due Process Clause in each of the following specific ways, among others:

> (a) It fails, as do the court decisions interpreting it, to notify people (who are later to become defendants) of the nature of the offenses for which they may be liable in punitive damages;
>
> (b) It likewise fails, as do the court decisions interpreting it, to guide judges and juries with regard to the nature of the offenses for which punitive damages may be awarded; and
>
> (c) It fails, as do the court decisions interpreting it, to inform judges and juries as to the proper means of calculating the amount of punitive damages to be awarded by reference to actual damages.

Considered separately and cumulatively, the foregoing statutory failures render O.C.G.A. § 51-12-5 invalid as a denial of due process.

As this Court noted in *Musser v. Utah*, 333 U.S. 95, 97 (1948): "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *See also*

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[6]Hence, Georgia law is distinguishable from Mississippi law, which proscribes "willful and intentional wrong, or such gross negligence and reckless negligence as is equivalent to such wrong". See Justice O'Connor's concurring opinion in *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988).

Cline v. Frink Dairy Co., 274 U.S. 445 (1927); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964).

Although the foregoing decisions involved criminal laws, the due process requirement of reasonable certainty in fixing a standard of obedience in advance applies to civil as well as criminal legislation. *Cline v. Frink Dairy Co., supra*, 274 U.S. at 463, citing *Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 238 (1925).[7]

The purposes of punitive damages are deterrence and retribution. *Haslip, supra*, 111 S.Ct. at 1044. A law, such as O.C.G.A. § 51-12-5, which does not specify the conduct to be deterred fails in its deterrent purpose and also punishes without warning.

In addition, vague penalty provisions pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given statute. *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Evans*, 333 U.S. 483 (1948). Certainly, then, a law which fails to inform judges and juries as to the proper means of calculating or determining the amount of punitive damages to be awarded (by reference to the compensatory damages incurred) is a violation of due process.[8]

The statute here in issue fails to set forth any meaningful standard or criterion for the jury to apply in determining whether or not to award punitive damages, and if so,

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[7]A state law which deprives a person of property without due process of law would violate the Due Process Clause whether that state law be criminal, or civil, or hybrid. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

[8]In Georgia, the "measure" of punitive damages is "the enlightened conscience of an impartial jury." *Head v. John Deere Plow Co.*, 71 Ga. App. 276, 279, 30 S.E.2d 662, 664 (1944). This was the "measure" of damages presented to the jury in the instant case in the charge (A.33). The jury was not instructed, as in *Haslip*, that it should consider the character and degree of the wrong and the necessity of preventing similar wrong. *Haslip*, 111 S.Ct. at 1044.

the amount. It leaves to the unbridled discretion of a random jury what to give and whether to give it.

Each award of punitive damages, therefore, represents not a governmental decision but an award that speaks to the conscience of a particular jury with no uniformity, thus permitting awards under the same or similar circumstances to vary widely and wildly in amount, according to the arbitrary notion, and potential prejudice, of one particular group of people. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("Consequently, juries assess punitive damages in wholly unpredictable amounts. . . ."); *Smith v. Wade*, 461 U.S. 30 at 59 (Rehnquist, J. dissenting) ("punitive damages are frequently based upon the caprice and prejudice of the jurors."); and *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) ("[T]he impact of these windfall recoveries is unpredictable and potentially substantial").

Under these circumstances, a state's interest in deterring improper conduct is delegated to a private party, accountable to no one, and "[t]he plaintiff's position is analogous to that of the prosecuting attorney whose pay is determined by the number of convictions he is able to secure." Morris, "Punitive Damages in Tort Cases", XLIV Harv. L. Rev. 1173 (1931). A prosecuting attorney's salary, however, pales in comparison to the potential pay-off to a successful plaintiff with a punitive damages claim.

Punitive damages as allowed by O.C.G.A. § 51-12-5, supra, are inconsistent in every respect with the requirements of procedural due-process.

In addition, O.C.G.A. § 51-12-5 violates the Equal Protection Clause. Punitive damages extracted from a civil litigant serve the same purpose as a fine imposed upon a criminal defendant, to wit: punishment. Punitive damages ". . . serve the same function as criminal penalties . . . ." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971)

(Marshall, J., dissenting); *overruled on other grounds, Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

As the court below recognized (A.11), punitive damages are "private fines levied by civil juries . . .", citing *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 350. Regardless of whether such "fines" are "public" or "private," they are "fines". This is particularly so in Georgia where a plurality of the Georgia Supreme Court once found such fines to be subject to Georgia's constitutional prohibition against "excessive fines". Ga. Const. 1983, Art. I, Sec. I, Par. XVII; *Colonial Pipeline Company v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988); but see A.12.

Although not criminal fines within the meaning of the Eighth Amendment, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), punitive damages awarded to private parties nevertheless are fines, at least quasi-criminal in nature, and hence should be treated for equal protection purposes in the same classification, or a class next thereto, as fines imposed in criminal cases.

When viewed in this light, the statute in issue here offends equal protection of the laws because it provides fewer protections for private litigants in tort suits than the criminal law provides to persons subject to fines. That is to say, comparing defendants in criminal cases liable for fines and defendants in civil cases liable for punitive damages (fines, *Gertz, supra*), the latter are denied equal protection because the former are afforded protections not afforded civil litigants, such as advance notice of the nature of the offenses for which they may be punished, and the consequent certainty that judges and juries will be informed of the nature of the offenses for which such punitive fines may be imposed.

Defendants in criminal cases also have the protection of a statutory limitation upon the amount of fine which may be imposed, and protection against double jeopardy. Moreover, persons charged with crimes may not be convicted unless they are found guilty beyond a reasonable

doubt, an important and fundamental protection of the individual against punitive action and a substantially higher burden of proof than a mere preponderance of the evidence. Civil defendants subject to punitive damage awards are denied these and other fundamental protections afforded defendants subject to criminal fines.

As the Chief Justice noted in his dissenting opinion in *Smith v. Wade, supra*, 461 U.S. at 59, punitive damages are "unaccompanied by the types of safeguards present in criminal proceedings." The denial of these safeguards under an open ended punitive damage statute permits "overkill" ("overdeterrence"), is not rationally related to a legitimate state interest (punishment or deterrence), and violates the Constitution.

In sum, the fines imposed as punitive damages in civil cases under Georgia's statute deprive civil defendants of the equal protection of the laws afforded criminal defendants, and the statute in issue should be declared unconstitutional for this additional reason.

CONCLUSION

Petitioner's constitutional claims are substantial. It has been punished in an amount vastly out of proportion to the nominal damages it was found to have caused. The Supreme Court of Georgia has refused to apply *Pacific Mutual v. Haslip* to the award entered in this case, notwithstanding this Court's remand order. Petitioner's punishment has been imposed, over its repeated objections and protests, without any of the safeguards or protections that due process, equal protection and *Haslip* require.

Notwithstanding *Haslip*, punitive damage awards continue to run wild. This case affords this Court the opportunity to reinforce *Haslip*. This Petition for Writ of Certiorari therefore should be granted and this case should be briefed and set for oral argument not only to

require compliance with *Haslip* but to address important punitive damages issues not reached in *Haslip*.

December 27, 1991

Respectfully submitted,

*By: /s/ HAROLD N. HILL, JR.
Harold N. Hill, Jr.

Attorneys for Petitioner
**Counsel of Record*

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Of Counsel:

MEADE BURNS
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

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Decided: October 18, 1991

In the Supreme Court of Georgia

46956. HOSPITAL AUTHORITY OF GWINNETT COUNTY v. JONES.

HUNT, Justice.

In the previous appearance of this case, this court sustained a punitive damage award against the hospital authority. *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759 (386 S.E.2d 120) (1989).[1] The United States Supreme Court vacated that judgment and remanded the case to us for reconsideration in light of *Pacific Mutual Life Ins. Co. v. Haslip*, U.S. (111 S.Ct. 1032, LE2d) (1991).

1. William Harold O'Kelley was severely burned in an automobile accident and was taken to Joan Glancy Hospital in Gwinnett County by ambulance, where he was stabilized. Shortly thereafter, in an attempt to airlift him by helicopter to a hospital with a burn unit, the helicopter crashed. Although others were killed, O'Kelley was only slightly injured, but died several days later as a result of the burns suffered in the automobile accident.

The administrator of O'Kelley's estate sued the hospital authority and was awarded $5,001.00 in nominal damages and $1,300,00.00 [sic] in punitive damages. This court observed:

> A policy of bypassing emergency care at a nearby hospital or diverting patients from an institution whose specialty would have been beneficial to a patient in order to utilize the authority's own hospitals supports a jury's finding of wanton disregard for the

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[1]In our original opinion, we noted the issue whether punitive damages are appropriately awarded against a hospital authority had not been raised in this case. But see, *Metropolitan Atlanta Rapid Transit Auth. v. Boswell*, Ga. (Case No. S91G0043, decided July 16, 1991); *Hospital Auth. of Fulton County v. Litterilla*, 199 Ga. App. 345 SE2d) (1991), *cert. granted* July 5, 1991.

> rights, and a conscious indifference to the best interests, of its injured patients. . . . [B]ecause the jury could decide that the patient's slight injuries in the helicopter incident would not have occurred but for the emergency care policy, the award of nominal damages was authorized and it was not inappropriate that the jury act to deter such conduct through the use of punitive damages under O.C.G.A. § 51-12-5.

Hospital Authority of Gwinnett County v. Jones, 259 Ga. at 761. This court approved the award of punitive damages, finding it neither excessive nor violative of due process.

In so holding, we pointed out that, in Georgia, the purpose of punitive damages is to deter the repetition of reprehensible conduct by the defendant or others. O.C.G.A. § 51-12-5.[2] Because deterrence is based on factors other than the actual harm caused, we rejected the notion that punitive damages must necessarily bear some relationship to the *actual* damages awarded by the jury.[3] *Id.*, at p. 762. We adhere to this ruling today.

While the Supreme Court in *Haslip* analyzed the punitive damages award by comparing it to the actual award, nothing in the opinion mandates such a comparison. In fact, the Court approved the Alabama review standards which include "whether there is a *reasonable relationship* between the punitive damages award and the harm *likely to result* from the defendant's conduct as well as the harm that actually has occurred." [Emphasis supplied.] While comparison to the actual damages may be appropriate in one case, e.g., *Colonial Pipeline v. Brown*, 258 Ga. 115, 123 (365 S.E.2d 827) (1988), it may not in another. We think *Jones* is one of the latter cases. The actual harm to

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[2]2 Under the new act, punitive damages may be awarded "to penalize, punish, or deter." O.C.G.A. § 51-12-5.1. *Hospital Authority of Gwinnett County v. Jones*, supra, 259 Ga. at p. 761, n. 5.

[3]We did, however, note that this relationship may be considered on the issue whether the punitive damage award is excessive due to undue passion and prejudice. *Jones*, supra at p. 762, n. 9.

O'Kelley was slight, but the potential harm to patients in other circumstances supports the punitive damages award here. The purpose of punitive damages, after all, is to deter such conduct. This award, therefore, is consistent both with the nature of the authority's conduct and the potential ensuing injuries. Surely the process is not rendered unconstitutional by permitting the deterrence of potentially dangerous conduct at a point in time when the injury is slight and when only nominal damages may be involved. Society's interest would seem better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided.

2. The authority's principal argument on remand is confined to the issue discussed in Division 1. We note, however, that in approving the Alabama procedures, the United States Supreme Court focused on the jury instructions, the post-trial procedures by the trial court, and the post-trial procedures by the state supreme court. *Haslip*, supra, 111 S.Ct. at 1044-46.[4] While Georgia jury instructions may be said to be quite similar to those given in Alabama, it is clear that the Alabama post-trial review by both the trial and appellate court is more structured. See, e.g., *Hammond v. City of Gadsden*, 493 So.2d 1374 (1986), and *Green Oil Co. v. Hornsby*, 530 So.2d 218 (1989).

For example, among the guidelines for the review by the Alabama Supreme Court are

> (c) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant. . . .

Haslip, supra, at 1045. We know of no Georgia courts, trial or appellate, which have reviewed these factors. This is not surprising, of course, since no evidence pertaining

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[4]In Alabama, civil suits exceeding $10,000 come within the appellate jurisdiction of the Alabama Supreme Court.

to either factor would have been submitted to the jury. Nor was such evidence offered in *Haslip* or in any of the other cited Alabama cases.[5] Of what benefit, then, is scrutiny of those elements by the reviewing courts? Any review of them in an effort to ensure that punitive awards are not grossly out of proportion to the conduct and the ensuing damages would be entirely a matter of conjecture or, at least, a matter of opinion based on extraneous factors. Consequently, the verdict in this case would not be more successfully challenged if subjected to Alabama's analysis rather than our own.

Punitive damages do not survive court scrutiny because they can be accurately measured and adjusted by court imposed guidelines.[6] They survive, as Justice Scalia notes, because of their historical acceptance.

> Nor to my mind can anything [but the conclusiveness of history] explain today's decision that a punishment who's assessment and extent are committed entirely to the discretion of the jury is 'fundamentally fair.' The court relies upon two inconsequential factors. First, the 'guidance' to the jury provided by the admonition that it 'take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.' That is not guidance but platitude. Second, review of the *amount* of the verdict by the trial and appellate courts, which are also governed by no discernable standard except what they have done in other cases . . . But it would surely not be considered 'fair' (or in accordance with due process) to follow a similar procedure outside of this historically ap-

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[5]"Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law." *Haslip*, supra, 111 S.Ct. at 1044.

[6]The legislature, on the other hand, has by its 1987 enactment, O.C.G.A. § 51-12-5.1(g), made an impact of undeniable significance. Had this case been tried under that statute, the award could have been only $250,000. Alabama enacted the same limitation, also in 1987. See 1987 Ala. Acts, No. 87-185, §§ 1, 2, and 4.

> proved context — for example, to dispense with meaningful guidance concerning *compensatory* damages, so long as whatever number the jury picks out of the air can be reduced by the trial judge or on appeal. I can conceive of no test relating to 'fairness' in the abstract that would approve this procedure, unless it is whether something even more unfair could be imagined.

Haslip, supra, 111 S.Ct. at 1053 (Scalia, J., concurring). Clothed in common law history and tradition, the punitive damage process is thus able to withstand a due process challenge which less inveterate procedures could not.

We have reconsidered our previous judgment in light of *Haslip* and have determined that its reversal is not required.

Judgment affirmed and reinstated on remand. All the Justices concur, except Bell and Fletcher, J.J., who concur in the judgment only.

SUPREME COURT OF GEORGIA
Atlanta, November 1, 1991

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOSPITAL AUTHORITY OF GWINNETT COUNTY ET AL. V. R. STANFORD JONES, ADMR., ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ LYNN M. STINCHCOMB
Lynn M. Stinchcomb,
Deputy Clerk

Decided: November 22, 1989

In the Supreme Court of Georgia

46956. HOSPITAL AUTHORITY OF GWINNETT COUNTY ET AL. v. JONES, ADMR. ET AL.

HUNT, Justice.

This case raises issues regarding punitive damages: whether the award is authorized under the facts of this case, whether the award is excessive, and whether punitive damages are constitutional under the excessive fines, equal protection, and due process clauses of our state and federal constitutions.[1]

On May 20, 1985,[2] William Harold O'Kelley was severely burned over seventy per cent of his body from a fire caused by a head-on collision between his truck and a car in Gwinnett County. Emergency personnel responding to the accident immediately called for a medivac helicopter to evacuate O'Kelley to Grady Hospital's burn unit. While still en route to the accident site, the supervisor of the Gwinnett Hospital Authority's emergency rescue unit, Metro Ambulance Services, Inc., countermanded the unanimous judgment of the emergency technicians at the scene and ordered the patient brought to Joan Glancy Hospital, one of the hospital authority's institutions, even though the helicopter was approaching as the ambulance was leaving with the patient. The helicopter was also diverted to Joan Glancy Hospital.

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[1]None of the parties before us raised the question whether punitive damages are appropriately awarded against a public authority and we express no opinion on this issue. Compare *City of Columbus v. Myszka*, 246 Ga. 571 (4) (272 SE2d 302) (1980) (a municipal corporation is not liable for punitive damages); *MARTA v. Binns*, 252 Ga. 289 (313 SE2d 104) (1984) (a rapid transit authority is liable for punitive damages in its capacity as a self-insurer).

[2]Thus, the 1987 legislative amendments to the damage provisions are not directly applicable. Ga. L. 1987, p. 915.

The Gwinnett Chief of Police, who was the dispatch officer at the time of the accident, related facts of other specific instances when an emergency patient was not taken to the nearest hospital or to a trauma center, but instead to one of the authority's institutions. He further testified that Metro's reason for this policy was to "provide more services to the county."

At the hospital emergency room the patient was stabilized, by the establishment of IV lines which the EMT had been unsuccessful in starting in the ambulance, placement of a respiratory tube in the patient's burned throat after he complained of shortness of breath about an hour after reaching the hospital, and administration of morphine. Due to the severity of his injuries, the patient's chances of survival were about 1%. About an hour and a half after arriving, O'Kelley was strapped into a stretcher and loaded onto the helicopter for evacuation to Humana hospital in Augusta. On lift-off from the hospital parking lot, the helicopter hit a light pole and crashed. Experts testified at trial that the accident was caused by gross pilot error, not only for flying into the pole, but also because the water-alcohol tank, which may have been necessary to give added power to the helicopter engine for the ascent from such a confined space, was empty.

Incredibly, though the pilot and another occupant of the helicopter were killed, O'Kelley was only slightly injured in the helicopter crash. O'Kelley was transported by ambulance to Grady Hospital, where he died six days later as a result of his extensive burns. The bill for services from Joan Glancy Hospital was $1,216.26.

The administrator of O'Kelley's estate sued [3] the Gwinnett Hospital Authority in its own capacity and as the owner of the Gwinnett Ambulance Services doing busi-

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[3]The driver of the other car involved in the accident and her employing companies were also sued, but that aspect of the case is not relevant here.

ness as Metro Ambulance Services, Inc.[4], for the negligent acts of the hospital authority employees.

The jury awarded O'Kelley's estate nominal damages of $5,001.00 against the hospital authority and Metro, and punitive damages of $1,300,000.00 against the Gwinnett Hospital Authority and $5,000.00 against Metro Ambulance Services, Inc. The hospital authority appeals.

1. In its first enumeration of error, the Gwinnett Hospital Authority contends the trial court erred in failing to direct a verdict in its favor on the ground that evidence did not authorize an award of punitive damages. The estate relied on two theories to support its demand for punitive damages: that the hospital authority, motivated by a desire to increase profits rather than by the best interests of its patients, directed emergency patients to its own institutions despite the fact that other hospitals were closer or more suited for the care required by the patient, and that the hospital authority failed to maintain proper emergency helicopter landing areas at its hospitals, specifically Joan Glancy, even though it knew the landings were unsafe and medivac helicopters would occasionally be required to use them.

OCGA § 51-12-5 provides for the award of punitive damages:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.[5]

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[4]Although the hospital authority owned Metro only from 1982 until it sold the service to the county in 1986, it retained the right to direct to which hospital the patients would be taken.

[5]Punitive damages to punish or penalize the defendant, as well as to deter him, are provided for under the revised act. Ga. L. 1987, p. 915.

The courts have consistently required that

> [t]o authorize the imposition of punitive or exemplary damages there must be evidence of wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. [Cits.]

Kaplan v. Sanders, 237 Ga. 132, 134 (227 SE2d 38) (1976); *Associated Health Systems v. Jones*, 186 Ga. App. 798 (2) (366 SE2d 147) (1988). The measure of damages, "within the enlightened conscience of a jury," appears to be judicially engrafted onto this code section.[6] *King v. Towns*, 102 Ga. App. 895, 904 (118 SE2d 121) (1960); *Head v. John Deere Plow Co.*, 71 Ga. App. 276, 279 (30 SE2d 662) (1944). See division 5, infra.

There is some evidence in this record to support a finding of aggravated conduct and, therefore, the award of punitive damages. A policy of bypassing emergency care at a nearby hospital or diverting patients from an institution whose specialty would have been beneficial to a patient in order to utilize the authority's own hospitals supports a jury's finding a wanton disregard for the rights, and a conscious indifference to the best interests, of its injured patients. Although the evidence was, to be sure, conflicting, it authorized a determination that the authority's decision was made on an economic, rather

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[6]This test must have been adopted from OCGA § 51-12-6: where "the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened conscience of impartial jurors." Under this code section, however, "evidence of the worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed" by the jury, with the express proviso that "the verdict should not be disturbed unless the court suspects bias or prejudice from its excess or its inadequacy." Under OCGA § 51-12-5, such evidence is excluded. *Bob Maddox Dodge, Inc. v. McKie*, 155 Ga. App. 263 (3), (270 SE2d 690) (1980); *Hodges v. Youmans*, 129 Ga. App. 481, 486 (200 SE2d 157) (1973).

than a medical, basis. Therefore, because the jury could decide that the patient's slight injuries in the helicopter incident would not have occurred but for the emergency care policy, the award of nominal damages was authorized and it was not inappropriate that the jury act to deter such conduct through the use of punitive damages under OCGA § 51-12-5.[7] *Woodbury v. Whitmire*, 246 Ga. 349, 351 (271 SE2d 491) (1980).

2. The award in this case is not, as a matter of law, excessive. See division 5, infra. That this award appears to bear no rational relationship to the extent of the injury is of no consequence.[8] "[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 US 323, 350 (94 SC 2997, 41 LE2d 789) (1974). The concept of proportionality as a *legal* limitation on the amount of punitive damages applies, in Georgia, only when such damages are given to compensate for wounded feelings. A deterrence award is based on factors, for the most part, unrelated to the injury to any particular victim, and is limited only by the collective conscience of the jury. *Smith v. Milikin*, 247 Ga. 369 (3) (276 SE2d 35) (1981); *King v. Towns*, supra, 102 Ga. App. at 904; *Davis v. Glaze*, 182 Ga. App. 18, 23 (354 SE2d 845) (1987); *Lang v. Hopkins*, 10 Ga. 37 (3) (1851); OCGA § 51-12-12. Compare *Jones v. Spindel*, 122 Ga. App. 390, 394 (177 SE2d 187) (1970). However, while in deterrence cases

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[7]Because punitive damages are supportable on the theory that the authority acted in conscious disregard of its patients' rights by diverting them to its own institutions, we need not address whether the failure to maintain an adequate heliport at Joan Glancy Hospital might also support the award. However, "[i]t is the general rule that the mere nonperformance of a duty, even though it be one required by law, will not authorize the recovery of punitive damages." *Kaplan v. Sanders*, supra, 237 Ga. at 133-134.

[8]The plaintiffs in this case sought no actual damages for injuries, including pain and suffering, or for wrongful death.

there is no fixed rule regarding a relationship between the award of punitive and actual damages, a court may always consider that fact in questioning the excessiveness of the verdict.[9] E.g., *Colonial Pipeline v. Brown*, 258 Ga. 115, 123 (365 SE2d 827) (1988) (plurality opinion).

3. There is no merit to the hospital authority's contention that an award of punitive damages violates the excessive fines clause of the Eighth Amendment to the United States Constitution. *Browning-Ferris Industries of Vermont, Inc. v. Kelso,* US , (57 USLW 4985, decided June 26, 1989). Nor, under the facts of this case, do we find a violation of the excessive fines clause of our Georgia Constitution, Art. I, Sec. I. Par. XVII. Compare, *Colonial Pipeline Co. v. Brown*, supra, 258 Ga. at (4).

4. Neither the lower standard for liability, the absence of certain protections available to criminal defendants, nor the lack of a ceiling on the amount of punitive damages that can be awarded, results in a denial of equal protection to civil, as compared to criminal, defendants. Because no fundamental rights or suspect classes are involved, these classifications pass the rational basis test under minimal scrutiny. *Colonial Pipeline Co. v. Brown*, supra, 258 Ga. at 124 (Clark, P.J., dissenting).

5. The hospital authority contends that OCGA § 51-12-5, supra, violates due process in that its notice as to the proscribed conduct is unconstitutionally vague and in that its measure of damages, based solely on the "enlightened conscience of the jury," permits verdicts which may be arbitrary and oppressive and yet not subject to limitation by appropriate procedural safeguards.

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[9]An inordinately large deterrence award may be set aside as reflecting undue passion and prejudice rather than an enlightened conscience, *Jones v. Spindel*, supra; OCGA § 51-12-12. We view the language in *Colonial Pipeline*, supra, 258 Ga. at 123, as to the lack of proportionality in this light. We do not see *Colonial* as inconsistent with such cases as *Smith v. Milikin*, supra, 247 Ga. at 372, or *King v. Towns*, supra, 102 Ga. App. at 904.

a. Initially, the hospital authority argues that neither a potential defendant nor a jury can distinguish between a "lack of ordinary care" amounting to negligence and an "entire want of care" entitling a plaintiff to punitive damages. We disagree. Since, under Georgia law, a scienter element which goes beyond even gross negligence is required, e.g., *BLI Construction Co., Inc. v. Debari*, 135 Ga. App. 299, 302 (217 SE2d 426) (1975), the standard of conduct set by OCGA § 51-12-5 is not unconstitutionally vague.

Under proper instruction from the trial court, a jury may distinguish between merely negligent or grossly negligent behavior and the scienter necessary to meet the standard for punitive damages: "wilful misconduct, malice, fraud, wantonness or oppression, or that entire want of care that raises a presumption of a conscious indifference to consequences." As the United States Supreme Court said in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 499-500 (102 SC 1186, 71 LE2d 362) (1982):

> The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. [Footnotes omitted.]

See generally, *Smith v. Wade*, 461 US 30, 46-51 (103 SC 1625, 72 LE2d 632) (1983); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (108 SC 1645, 100 LE2d 62) (1988) (Justice O'Connor concurring in part.)[10]

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[10] "Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate."

b. Punitive damages, like damages for pain and suffering, are decided in this state according to the "enlightened conscience of the jury." The hospital authority contends this standard denies due process in failing to establish any guidelines to channel the broad discretion of the jury.

The right to punitive damages derives from the common-law.[11] See, 1 Callaghan, *Punitive Damages Law and Practice*, § 1.01.[12] Although OCGA § 51-12-5 codifies the right to punitive damages where "there are aggravating circumstances, in either the act or the intention," guidelines for neither the conduct nor the amount of damages are included in the statute. As set out in division 1, supra, the standard for judging the defendant's conduct entitling the plaintiff to punitive damages has been judicially explicated. See also, division 5(a). Likewise, the standard by which the jury assesses damages has been judicially engrafted onto the statute.[13] Historically, the jury's dis-

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[11]"Whether in this case common-law remedies . . . constitute due process of law must turn on an analysis of the competing interests at stake, viewed against the background of "history, reason, [and] the past course of decisions." *Ingraham v. Wright*, 430 US 651, 675 (97 SC 1401, 51 LE2d 711) (1977).

[12]Callaghan points out in his treatise, supra, at § 3.03, p. 3-15:

> thus far, each time a punitive damages statute has been attacked on void-for-vagueness grounds, the argument has been rejected because the courts have found sufficient standards to properly apply the challenged legislation. In addition to the reasons for doing so supplied by the courts, those results may be due, in large measure, to the fact that the statutes amounted to nothing more than a codification of a general common-law rule.

E.g., *Bertero v. National General Corp.*, 529 P2d 608, 625 n.13 (118 Cal. Rptr. 184) (1975).

[13]Since the standard for measuring damages is judicially created, see n. 6, supra, we recommend that trial courts, even under the new statute, see n. 2, supra, consider charging the jury on the factors appropriate to the verdict. Such factors may include: (1) the nature and egregiousness of the defendant's conduct; (2) the extent and duration of the defendant's wrongdoing and the possibility of its recurrence; (3) the intent of the defendant in committing the wrong;

cretion is controlled *by the facts of the case* as evaluated "in the enlightened conscience of the jury." See n. 6, supra. It is important to point out, however, that there are other controls upon the jury's verdict, which have served over the years as a check to the jury's unbridled discretion.

The statutory scheme itself is designed to protect defendants against excessive verdicts. As was said in *Brown v. Service Coach Lines, Inc.*, 71 Ga. App. 437, 444 (31 SE2d 236) (1944):

> [t]he rules of law governing (1) the right of the jury to originally fix the damages, (2) the right of the appellate court to grant a new trial where the verdict is alleged to be excessive or inadequate, and (3) the right of the trial judge to grant a new trial where in his discretion he thinks the verdict 'unfair, unjust, contrary to the evidence, excessive, or too small,' exist apart from and independent of each other.

Trial courts are authorized to set aside arbitrary verdicts under OCGA § 51-12-12:

> The question of damages is one for the jury; and the court should not interfere with the jury's discretion unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias,

or, if requested by a proper motion for new trial under OCGA § 5-5-20, ". . . when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury." In fact, the rule allowing a trial court to

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(4) the profitability of the defendant's wrongdoing; (5) the amount of actual damages awarded; (6) previous awards of punitive damages against the defendant; (7) potential or prior criminal sanctions against the defendant based upon the same wrongful acts; and (8) any other pertinent circumstances. 1 Callaghan, supra, at § 5.39 (Supp. 1989). Under the new law, Ga. L. 1987, p. 915, evidence of the financial circumstances of the defendant may be admissible.

grant a new trial under OCGA § 5-5-20 is considerably less stringent than under OCGA § 51-12-12:

> When a trial judge orders a new trial on the general grounds in a damage case, this court will presume that his mind and conscience were satisfied that the verdict was unjust in some respect; not merely that he himself, if he had been acting as a juror, would not have fixed upon the amount specified in the verdict. If the judge, had he been upon the jury, could not conscientiously have given acquiescence to the verdict rendered, he is not required to approve it; and we will not control him in refusing to do so. On the other hand, if he can conscientiously acquiesce in the verdict, though it may not exactly accord with his best judgment, or though some other finding might seem somewhat more satisfactory to his mind, and if his sense of justice is reasonably satisfied, he should, in the absence of some material error of law, affecting the trial approve it, and this court will uphold him in so doing.

Holland v. Williams, 3 Ga. App. 636, 638 (60 SE 331) (1907). As was said in *Seaboard Air-Line Ry. Co. v. Benton*, 43 Ga. App. 495, 505 (159 SE 717) (1931),

> [b]efore a verdict becomes final it should, where the losing party requires it by a motion for a new trial, receive the approval of the mind and conscience of the trial judge. He is sometimes spoken of as the thirteenth juror. Until his approval is given, the verdict does not become binding, in a case where a motion for a new trial contains the general grounds.

Thus, under both of these statutes, a trial court has the broad discretionary authority to set aside any judgment it considers excessive and not supported by the evidence.[14]

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[14]Ga. L. 1987, p. 915 reveals an even stronger state policy authorizing trial judges to reduce or reject excessive verdicts not in accordance with the *preponderance of the evidence*.

The appellate courts may also set aside an oppressive jury verdict under OCGA § 51-12-12. Although the statutory standard has been variously described,

> [a]s a general rule, the size of the award for damages in a case such as this is left to the enlightened conscience of impartial jurors, *subject to approval of the trial court. Jones v. Spindel*, 122 Ga. App. 390 (177 SE2d 23) (1970). The appellate court will not disturb the award "absent an award so excessive or inadequate as to shock the judicial conscience." [Emphasis supplied.]

Davis v. Glaze, supra, 182 Ga. App. at 23. Accord, *Smith v. Milikin*, supra, 247 Ga. at 372. While this test admittedly sets a high threshold for an appellate court to upset a jury verdict, that standard is not unlike the "arbitrary and unreasonable" measure for unconstitutionality. E.g., *Barrett v. Hamby*, 235 Ga. 262, 265 (219 SE2d 399) (1975).

We hold that the general standard of review of damages awards set out in OCGA § 51-12-12 and OCGA § 5-5-20 is designed to protect defendants subjected to punitive damages that amount to a deprivation of property. Thus, we conclude the statutory scheme providing for punitive damages does not deny due process for failing to provide adequate procedural safeguards and is not *per se* unconstitutional, but under OCGA § 51-12-12, and, if requested by a motion for new trial under OCGA § 5-5-20, each verdict must be scrutinized to see that it meets the parameters of due process.

In the case before us, the hospital authority moved for a new trial and specifically requested the trial court to review the punitive damages awarded. The trial court declined to set the award aside. We have reviewed the evidence presented in this case and hold, under the circumstances presented, the trial court did not abuse its discretion in refusing to overrule the jury's punitive damage award. Nor, do we find the judgment so excessive

as to be unconstitutional. OCGA § 5-5-20; OCGA § 51-12-12. We affirm.

Judgment affirmed. Clarke, P. J., Smith, J., Gregory, J., Bell, J., and Judge James W. Head concur in the opinion. Marshall, C. J., concurs in the judgment only. Weltner, J., not participating.

SUPREME COURT OF GEORGIA
Atlanta, December 20, 1989

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOSPITAL AUTHORITY OF GWINNETT COUNTY ET AL. V. R. STANFORD JONES, ADMR., ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied. Marshall, C.J., Clarke, P.J., Smith, Gregory & Bell, JJ., and Judge James W. Head concur. Weltner, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ JOLINE B. WILLIAMS
Joline B. Williams, Clerk

THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Plaintiff, vs. HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC., Defendants.	CIVIL ACTION 87A-17816-4

JUDGMENT

[Filed September 27, 1988]

The foregoing action having come on regularly for trial by jury before the Court on September 19, 1988, Honorable Harris Adams presiding, and the issues having been duly tried and the parties having presented witnesses and evidence, and the jury having returned a verdict in favor of the Plaintiff and against the Defendants, jointly and severally in the amount of $5,001.00 as nominal damages, $1,300,000.00 as exemplary damages against Defendant Hospital Authority of Gwinnett County and $5,000.00 as exemplary damages against Defendant Metro Ambulance Services, Inc., it is hereby ordered that the verdict of the jury shall be made the judgment of the Court.

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff R. Stanford Jones, as Administrator of the Estate of William Harold O'Kelley, shall have and re-

cover of Defendants Hospital Authority of Gwinnett County and Metro Ambulance Services, Inc., jointly and severally, $5,001.00, together with $1,300,000.00 from Defendant Hospital Authority of Gwinnett County and $5,000.00 from Defendant Metro Ambulance Services, Inc., together with interest thereon from the date of this Judgment at the rate of 12% as provided by law. Further, Plaintiff shall have and recover from Defendant Hospital Authority of Gwinnett County prejudgment interest in the amount of $60,000.00.

IT IS SO ORDERED this 27th day of September, 1988.

By: /s/ HARRIS ADAMS
Honorable Harris Adams, Judge
State Court of Cobb County

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Plaintiff, vs. HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC., Defendants.	CIVIL ACTION 87A-17816-4

AMENDMENT TO THE ANSWER AND DEFENSES OF THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, D.B.A. GWINNETT HOSPITAL SYSTEM TO COMPLAINT OF PLAINTIFF

[Filed April 14, 1988]

Comes now THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, d.b.a. GWINNETT HOSPITAL SYSTEM, erroneously designated as Gwinnett Ambulance Services, named as a defendant in the above-entitled action, and files this its Amendment To Its Answer and Defensive Pleadings to the Complaint of Plaintiff as follows:

NINTH DEFENSE

The statutes of the state of Georgia which authorize the imposition of aggravated, exemplary, or punitive damages (O.C.G.A. §§ 51-12-5 or 51-12-5.1) are contrary, by their

express terms and as they may be applied to this defendant in this case, to the Constitution of the United States and the Georgia Constitution, and are therefore void inasmuch as said statutes allow for the deprivation of property without due process of law (U.S. Constitution Amendments V and XIV; Georgia Constitution Article 1, Section 1, Paragraph 1) in that:

(1) Said statutes fail to define or provide advance notice of the prohibited behavior with reasonable clarity.

(2) Said statutes fail to specify the upper limit of damages to be imposed.

(3) Said statutes fail to set standards or criteria for the jury to apply in determining whether to impose punitive damages and, if so, the amount thereof.

As a consequence of the above defects in the statutes, the statutes leave to the unbridled discretion of a random jury whether to impose such damages and the amount thereof, thereby authorizing an award of aggravated, exemplary, or punitive damages which is unpredictable, arbitrary, capricious and disproportionate.

TENTH DEFENSE

The statutes of the state of Georgia which authorize the imposition of aggravated, exemplary, or punitive damages are contrary by their express terms and as they may be applied to this defendant in this case, to the Constitution of the United States and the Georgia Constitution, and are therefore void inasmuch as said statutes deny the defendant equal protection of the laws (U.S. Constitution Amendment XIV; Georgia Constitution, Article 1, Section 1, Paragraph 2) by providing fewer protections for civil litigants than the criminal laws provide to persons

accused of violation of criminal statutes which provide for the imposition of monetary fines in that:

(1) Said statutes fail to define or provide advance notice of the prohibited behavior with reasonable clarity whereas criminal defendants are entitled to such notice.

(2) Said statutes fail to specify the upper limit of damages to be imposed whereas criminal statutes imposing similar penalties must be limited.

(3) Said statutes allow imposition of such damages upon the "preponderance of the evidence" rather than the "beyond a reasonable doubt" standard applied in similar criminal cases.

(4) Said statutes contemplate the imposition of such damages against civil litigants who have been compelled to give evidence against themselves under the Georgia Civil Practice Act, whereas criminal defendants in similar cases cannot be so compelled.

ELEVENTH DEFENSE

The statutes of the state of Georgia which authorize the imposition of aggravated, exemplary or punitive damages are contrary, by their express terms and as they may be applied to this defendant in this case, to the Constitution of the United States and the Georgia Constitution, and are therefore void inasmuch as said statutes allow for the imposition of an excessive fine (U. S. Constitution Amendments XVIII and XIV; Georgia Constitution, Article 1, Section 1, Paragraph 17).

WHEREFORE, having added the above amendments to its defenses, this defendant prays:

(a) That the Plaintiff's Complaint be dismissed and for judgment in this defendant's favor and against the plaintiff, with all costs cast against the plaintiff;

(b) In the event that a judgment is entered in favor of the plaintiff against this defendant, then this defendant is entitled to total indemnity against Metro Ambulance Services, Inc.;

(c) That there be a trial by jury composed of twelve (12) persons;

(d) For such other relief as may be deemed just and equitable by the Court.

LONG, WEINBERG, ANSLEY & WHEELER

By /s/ MEADE BURNS
Meade Burns, Attorney at Law, P.C.
State Bar of Georgia No. 097000

ATTORNEYS FOR DEFENDANT, THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, d.b.a. GWINNETT HOSPITAL SYSTEM
2500 Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
Telephone No.
(404) 688-7900

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Plaintiff, vs. HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC., Defendants.	CIVIL ACTION NO. 87A-17816-4

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STRIKE PLAINTIFF'S CLAIM FOR EXEMPLARY DAMAGES

[Filed July 7, 1988]

Comes now HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, d.b.a. GWINNETT AMBULANCE SERVICES, a defendant in the above-styled action and respectfully moves this Court pursuant to O.C.G.A. § 9-11-7(b)(2) to dismiss the plaintiff's claims of exemplary damages, or in the alternative, pursuant to O.C.G.A. § 9-11-12(f) to strike the plaintiff's claim for

exemplary damages, showing the Court the reasons more fully in the defendant's brief attached hereto.

LONG, WEINBERG, ANSLEY & WHEELER
By /s/ MEADE BURNS
Meade Burns, Attorney at Law, P.C.,
State Bar of Georgia No. 097000

ATTORNEYS FOR DEFENDANT, THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, d.b.a. GWINNETT HOSPITAL SYSTEM
999 Peachtree Street, N.E.
Suite 2700
Peachtree Place Tower
Atlanta, Georgia 30309

(404) 876-2700

IN THE STATE OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY,

Plaintiff,

vs.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC.,

Defendants.

CIVIL ACTION
NO. 87A-17816-4

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STRIKE THE EXEMPLARY DAMAGES CLAIMED

[Filed July 7, 1988]

[Brief Abbreviated]

Punitive damages are repugnant to the Georgia Constitution and the Constitution of the United States of America in that they deprive the defendant of life, liberty and property without due process of the law (U.S. Const. Amend. XIV, Ga.Const. Art. 1, §1, ¶1); they deny the defendant the equal protection of the laws (U.S. Const. Amend. XIV, Ga.Const. Art. 1, §1 ¶2); and they violate the excessive fines clauses of the Georgia and United States Constitution (U.S. Const. Amend. VIII, Ga. Const. Art. 1, §1, ¶17).

* * *

[The Brief then argues each of the foregoing constitutional provisions, citing decisions of this Court, among others.]

CONCLUSION

THEREFORE, any award of punitive damages that may be available in the present case, clearly violates constitutional prohibitions against excessive fines, they deny due process, and they deny the equal protection of the laws of the United States and the state of Georgia. The defendant respectfully requests that this Court dismiss or strike the claim for punitive damages in the present action.

Respectfully Submitted:

LONG, WEINBERG, ANSLEY & WHEELER

BY: /s/ MEADE BURNS
Meade Burns, Attorney at Law, P.C.
State Bar of Georgia No. 097000

ATTORNEYS FOR DEFENDANT, THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, d.b.a. GWINNETT HOSPITAL SYSTEM
999 Peachtree Street, N.E.
Suite 2700
Peachtree Place Tower
Atlanta, Georgia 30309
(404) 876-2700

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY,

Plaintiff,

vs.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC.,

Defendants.

CIVIL ACTION
NO. 87A-17816-4

ORDER

[Filed August 11, 1988]

The above-styled case having come before this Court on Motions to Strike or Dismiss Plaintiff's Claim for Exemplary Damages by Defendant Hospital Authority of Gwinnett County, Georgia, d/b/a Gwinnett Ambulance Services and Defendant Metro Ambulance Services, Inc., and Plaintiff's and Defendant Metro Ambulance Services, Inc.'s Motions in Limine, and after an oral hearing of said Motions, this Court, after examining the briefs, citations of authority and the file as a whole, finds as follows:

1.

Colonial Pipeline Co. v. Brown, 258 Ga. 115 (1988) is not authority which compels this Court to strike or dismiss the Plaintiff's claim for exemplary damages. The

issue of exemplary damages claimed in this case is an appropriate one for the jury to consider.

2.

The Defendants' remaining constitutional arguments to strike or dismiss the Plaintiff's claim for exemplary damages are without merit.

THEREFORE, it is ORDERED that both of the Defendants' Motions to Strike or Dismiss Plaintiff's Claim for Exemplary Damages are hereby DENIED.

In addition, those portions of the Plaintiff's and the Defendant Metro Ambulance Services, Inc.'s Motions in Limine which are not agreed to or withdrawn are hereby DENIED.

SO ORDERED, this 10th day of August, 1988.

/s/ A. HARRIS ADAMS
A. Harris Adams, Judge
State Court of Cobb County

MOTION FOR DIRECTED VERDICT

[Made September 23, 1988]

MR. BURNS: . . .

May it please the Court, on behalf of the Hospital Authority of Gwinnett County, I would move for the direction of a verdict on punitive damages, in that the evidence adduced during the course of the trial would admit of no verdict other than a verdict for the Hospital Authority of Gwinnett County, and more specifically the evidence brought forward during the course of this trial established that the negligence, if any, on the part of the Hospital Authority did not rise to that level of negligence as would warrant a finding of punitive damages against the Hospital Authority, and I would further move and suggest to the Court that the Hospital Authority of Gwinnett County is entitled to a direction of a verdict in its favor with respect to punitive damages because the Constitutional defenses — not only the Constitutional defenses of the State of Georgia, but the Constitutional defense of the United States of America as submitted to the Court previously in briefs, and read and ruled on by the Court — and I would like to adopt and incorporate those at this time — my brief in support of that motion to dismiss punitive damages, if that is agreeable with the Court — (T. 632-633)

JURY INSTRUCTIONS REGARDING PUNITIVE DAMAGES

[Given September 23, 1988]

Members of the Jury, where the law requires one party to pay damages to another, it seeks to see that the damages awarded are fair as to both parties.

If you believe from a preponderance of the evidence that the Plaintiff is entitled to recover, you should award to the Plaintiff such sums as you believe are reasonable and just in this case.

Now, the Plaintiff seeks nominal damages, and exemplary damages only in this case. If the injury is small, or mitigating circumstances are strong, only nominal damages are given. What would be a proper amount of nominal damages is a question for you to decide under all the facts and circumstances of this case.

The legal definition of nominal damages is a "small amount."

Now, in a tort action in which there are aggravating circumstances, either in the act or the intention, the Jury may give additional damages to deter the wrongdoer from repeating the trespass.

Punitive, that is aggravated damages, may be authorized when the circumstances of the wrong are such as to show an entire want of care, and an indifference to the consequences.

The measure of such damages is your enlightened conscience as an impartial Juror, and unless you find that the Plaintiff would be entitled to recover nominal damages as against a particular Defendant, you could not award exemplary damages against that Defendant.

Now, it is not essential to recover for punitive damages that the person inflicting the damages was guilty of willful and intentional misconduct. It is sufficient that the

act be done under such circumstances as evinces an entire want of care and conscious indifference to consequences.

Such conduct may constitute aggravating circumstances in the act which would authorize a Jury to give additional damages, that are also known as exemplary damages.

Now, the law does not permit you in arriving at your verdict to be governed by sympathy or prejudice. You may not, therefore, base your verdict in this case upon sympathy for or prejudice against either party.

On the contrary, your verdict must be supported by the evidence, based on the law as given to you in charge by this Court. (T. 743-745)

OBJECTIONS TO JURY INSTRUCTIONS ON PUNITIVE DAMAGES

[Made September 23, 1988]

MR. BURNS: May it please the Court, on behalf of my client we would take exception to the Court's charge to the Jury, or charges to the Jury on exemplary or punitive damages for the same reasons as expressed in our motion to dismiss punitive damages, the Constitutional reasons, and as we expressed on our motion for summary — directed verdict on Constitutional grounds, so we take exception to those charges on punitive damages, for those reasons.

THE COURT: I acknowledge the exceptions, but abide by my rulings, and for the same grounds, and upon the same reasons that I have set forth in my order and previous expressions denying the motion for directed verdict. (T.760-761)

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES,
Administrator of the
Estate of WILLIAM
HAROLD O'KELLEY,

Plaintiff,

vs.

HOSPITAL AUTHORITY
OF GWINNETT COUNTY,
Individually and d.b.a.
GWINNETT AMBULANCE
SERVICES; METRO
AMBULANCE SERVICES,
INC.,

Defendants.

CIVIL ACTION
NO. 87A-17816-4

MOTION OF DEFENDANT, THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON ALL ISSUES AND FOR REMITTITUR OF THE VERDICT

[Filed October 7, 1988]

Comes now Defendant The Hospital Authority of Gwinnett County, Georgia, (hereinafter "Defendant Hospital Authority") and moves pursuant to O.C.G.A. §9-11-50(b) and pursuant to the Uniform State Court Rules to set aside the verdict rendered on September 23, 1988, in favor of Plaintiff and the Judgment entered thereon on September 27, 1988, and to have judgment entered in favor of Defendant Hospital Authority dismissing with prejudice Plaintiff's Complaint as to the claim for punitive damages in accordance with Defendant's Motion for Directed Verdict made at the close of all the evidence. As

grounds for this Motion, Defendant Hospital Authority shows:

1.

This action was tried to a jury beginning on September 19, 1988, and the jury returned its verdict in favor of Plaintiff for Five Thousand One Dollars ($5,001.00) in nominal damages jointly against both defendants, Five Thousand Dollars ($5,000.00) in punitive damages against Defendant Metro Ambulance Services, Inc. and One Million Three Hundred Thousand Dollars ($1,300,000.00) in punitive damages against this Defendant on September 23, 1988. Judgment on said verdict was entered on September 27, 1988.

2.

The close of all the evidence, Defendant Hospital Authority moved for a directed verdict in its favor on the grounds that the uncontradicted evidence showed that there were no aggravating circumstances in either the act or the intention of the Defendant Hospital Authority upon which to base an award of punitive damages and that the evidence introduced, with all reasonable deductions, demanded a verdict in favor of Defendant Hospital Authority.

3.

In addition, Defendant moved for a directed verdict in its favor on the grounds that the statutes of Georgia regarding punitive damages are repugnant to the Constitution of the State of Georgia and the Constitution of the United States of America in that they deprive the Defendant of life, liberty and property without due process of the law, deny the defendant equal protection of the law, and violate the excessive fines clauses of said Constitutions.

4.

Defendant's Motion for Directed Verdict at the close of all the evidence was denied by the Court.

IN THE ALTERNATIVE, Defendant moves to set aside the said verdict and judgment entered thereon and to order a new trial of all issues. As grounds, Defendant shows:

1.

The verdict and judgment are contrary to the great weight of evidence in that there was no negligent act or omission of the Defendant Hospital Authority upon which to base a claim for nominal damages.

2.

That the verdict and judgment are contrary to the great weight of evidence in that there were no aggravating circumstances in either the act or the intention of the Defendant Hospital Authority upon which to base a claim for punitive damages.

3.

The verdict and judgment are contrary to law in that the award of punitive damages is repugnant to the Constitution of the State of Georgia and the Constitution of the United States of America in that it deprives the Defendant of life, liberty and property without due process of the law, denies the Defendant equal protection under the laws, and violates the excessive fines clauses of the above-stated constitutions.

4.

The verdict is clearly so excessive as to be inconsistent with the great weight of evidence in the case.

5.

The verdict is so excessive that it clearly demonstrates gross mistake, prejudice or bias on the part of the jury thereby permitting the trial court to order a new trial or reduce the amount of damages awarded against this Defendant.

In support of this Motion Defendant submits herewith its brief containing argument and citation of authorities. Defendant reserves the right to add to and supplement the grounds for this Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial as to all issues and for Remittitur, upon receipt of the transcript of the trial record. Uniform State Court Rule 41.1 allows the trial court to hear motions for new trial immediately after filing and prior to the preparation of the transcript of proceedings.

WHEREFORE, Defendant Hospital Authority prays that its Motion be granted and that the verdict and judgment thereon in Plaintiff's favor be set aside and that judgment be entered in favor of Defendant dismissing with prejudice Plaintiff's Complaint as to the claim for punitive damages or, in the alternative, that a new trial as to all issues be ordered, or that the Court reduce the amount of punitive damages awarded against Defendant and that Defendant have such other and further relief as is just and proper.

RESPECTFULLY SUBMITTED this 7th day of October, 1988.

LONG, WEINBERG, ANSLEY & WHEELER

By /s/ MEADE BURNS

Meade Burns, Attorney at Law, P. C.
State Bar of Georgia No. 097000

ATTORNEYS FOR DEFENDANT, THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA
999 Peachtree St., N. E.
Suite 2700
Atlanta, GA 30309
(404) 876-2700

THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY,

Plaintiff,

vs.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d.b.a. GWINNETT AMBULANCE SERVICES; METRO AMBULANCE SERVICES, INC.,

Defendants.

CIVIL ACTION
NO. 87A-17816-4

ORDER

[Filed January 19, 1989]

The above-styled case having come before this Court on Motion of the Defendant, The Hospital Authority of Gwinnett County, for Judgment Notwithstanding the Verdict on the Issue of Punitive Damages, and, in the Alternative, for a New Trial on All Issues and for Remittitur of the Verdict, and the Plaintiff having responded thereto, after an oral hearing on said motions and after considering the briefs of the parties, citations of authority and the entire record, this Court finds as follows:

The Defendant argues that the Court erred in failing to Direct a Verdict for this Defendant as to the Plaintiff's claim for punitive damages in that the Georgia statute which authorizes the imposition of punitive damages is unconstitutional and violates both the Constitution of the State of Georgia and the Constitution of the United States, in that it deprives the Defendant of life, liberty

and property without due process of law, denies the Defendant equal protection under the law, and violates the excessive fines clause of the Constitutions. The Defendant contends that denying this Motion was error and that the Defendant is entitled to Judgment Notwithstanding the Verdict as to this claim.

* * *

[The court next reviews the decisions relied upon by the Hospital Authority, including decisions of this Court.]

In conclusion, after reviewing Defendant's arguments and the response by the Plaintiff, Defendant's Motions for Judgment Notwithstanding the Verdict, Motion for New Trial and for Remittitur of the Verdict are all hereby DENIED.

So ordered, this 19th day of January, 1989.

/s/ A. HARRIS ADAMS
A. Harris Adams, Judge
State Court of Cobb County

IN THE SUPREME COURT OF
THE STATE OF GEORGIA

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, Individually and d.b.a. GWINNETT AMBULANCE SERVICES, Appellant, vs. R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Appellee.	CASE NO. 46956

ENUMERATION OF ERRORS

[Filed May 19, 1989]

I.

The evidence was insufficient to support a verdict against The Hospital Authority of Gwinnett County, Georgia, awarding punitive damages, and, therefore, the trial court erred in refusing to grant a Motion for a Directed Verdict and denying a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on the issue of Punitive Damages and for Remittitur.

II.

The verdict and judgment awarding $1,300,000.00 in punitive damages against The Hospital Authority of Gwinnett County, Georgia, is excessive as a matter of law and the trial court erred in refusing to grant a Motion for Judgment Notwithstanding the Verdict or, in the Alterna-

tive, for a New Trial on the issue of Punitive Damages and for Remittitur.

III.

The punitive damage statute of the state of Georgia, O.C.G.A. § 51-12-5, is unconstitutional by its express terms and as it was applied to The Hospital Authority of Gwinnett County, Georgia, in this case, and the verdict and judgment for punitive damages against The Hospital Authority is unconstitutional and void inasmuch as the statute permits and the verdict and judgment constitute the imposition of an excessive fine and inasmuch as the statute and the verdict and judgment deny The Hospital Authority due process of the law and equal protection of the law. Therefore, the trial court erred in denying a Motion for Directed Verdict and a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on the issue of Punitive Damages and for Remittitur.

This 19th day of May, 1989.

LONG, WEINBERG, ANSLEY & WHEELER

By /s/ MEADE BURNS
Meade Burns, Attorney at Law, P.C.
State Bar of Georgia No. 097000

By /s/ M. B. SATCHER III
M. B. Satcher III
State Bar of Georgia No. 626888

By /s/ GLENN E. KUSHEL
Glenn E. Kushel
State Bar of Georgia No. 430498
ATTORNEYS FOR APPELLANT
THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, Individually and d.b.a. GWINNETT AMBULANCE SERVICES
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
Telephone No. (404) 876-2700

Supreme Court, U.S.
FILED
JUL 29 1992

(2)

No. 91-1047

In The

Supreme Court of the United States

October Term, 1991

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY GEORGIA, Individually and d/b/a GWINNETT AMBULANCE SERVICES,

Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

*ALBERT M. PEARSON, III
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5187

JAMES E. BUTLER, JR.
ROBERT D. CHEELEY
BUTLER, WOOTEN, OVERBY, & CHEELEY
Resurgens Plaza
Suite 1790
945 East Paces Ferry Rd.
Atlanta, Georgia 30326
(404) 237-9660

Attorneys for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Supreme Court of Georgia complied with this Court's mandate to reconsider its ruling in *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989), in light of the due process standards recognized and applied in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___ (1991)?

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No. 91-1047

In The

Supreme Court of the United States

October Term, 1991

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY GEORGIA, Individually and d/b/a GWINNETT AMBULANCE SERVICES,

Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

As a jurisdictional matter, the only issue that now can be brought before this court is whether the Georgia Supreme Court correctly applied the due process standards set forth in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___ (1991) when it reaffirmed the award of punitive damages to Respondent. Petitioner, however, attempts to raise before this Court a more generalized due process and equal protection challenge to the Georgia

Supreme Court's ruling below.[1] This attempt to expand the scope of review is inappropriate. In its briefs on remand and at oral argument below, Petitioner advanced only the narrow due process argument that under *Haslip* the propriety of punitive damages was determined predominantly, if not exclusively, by looking at the ratio between compensatory and punitive damages.[2] In this vein, Petitioner acknowledged below that *Haslip* found the common law method for assessing punitive damages not to be *per se* unconstitutional.[3] The Petitioner accordingly dropped its general constitutional attack on Georgia's scheme for the award of punitive damages and

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[1] In Question 2, which has four sub-parts based either on due process or equal protection grounds, the Petitioner raised three variations on the void for vagueness doctrine and argued the Georgia law violated equal protection. Petition for Writ of Certiorari at i.

[2] In the Appendix to Respondent's Brief in Opposition, both briefs submitted by the Petitioner Hospital Authority on remand in this case are included in full. An examination of both will disclose that the issues set forth in Question 2 were not raised before the Georgia Supreme Court. This is borne out by the Georgia Supreme Court's ruling below reaffirming the award of punitive damages. *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991).

[3] Brief of Appellant on Remand, Respondent's Appendix at A-5.

confined its argument thereafter to the narrow question of *Haslip's* impact, if any, on the original opinion in this case.[4]

In Respondent's view, only this question is now properly before this Court pursuant to 28 U.S.C. § 1257(a). It was the constitutional question sent back for further consideration on remand, the only question put before the Supreme Court of Georgia and the only question, in fact, decided.[5] Respondent received its copy of the Petition for Certiorari in this case on December 30, 1991 and this Brief in Opposition is filed within the thirty-day time period provided for under Rule 15.2 of the Rules of this Court.

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[4] The Georgia Supreme Court noted as much when it stated that the "principal argument on remand is confined to the issue discussed in Division 1." *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 615, 409 S.E.2d 501, 503 (1991). The reference to Division 1 of the Georgia Supreme Court's opinion on remand was to the ratio argument advanced by the Petitioner.

[5] This Court has long followed the rule that it will not in the exercise of its certiorari jurisdiction consider any federal question unless the question has been presented to the lower court whose decision is under review. In *Webb v. Webb*, 451 U.S. 493 (1981,) this Court explained the reasons for the rule:

> There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the party the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to

(Continued on following page)

STATEMENT OF CASE

1. Jury Trial

Respondents believe that the statement of facts by the Georgia Supreme Court in its two prior rulings is adequate for consideration of the present petition.[6] Respondent, therefore, would only like to emphasize certain factors. First, the case was litigated as a punitive damages case from the very outset and the Petitioner was well aware of what to expect. Petitioner viewed this as a constitutional test case and shaped its trial and motion strategy accordingly. Second, the Respondent proved liability for both negligence and the award of punitive damages by: (a) showing that Mr. O'Kelley had been

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exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to the state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own work load, this is a very substantial matter. *Id.* at 500-501.

[6] *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989); *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991).

improperly routed to Joan Glancy Hospital (rather than Grady Hospital in Atlanta) for reasons that were economic in nature and largely unrelated to medical considerations; and (b) demonstrating that the helicopter carrying Mr. O'Kelley was directed to the Joan Glancy Hospital parking lot, a location that was unsafe for such helicopter landings and was known to be unsafe for such landings by Hospital Authority officials for several years prior to the O'Kelley accident. Third, under the Georgia Supreme Court's decision in *Moore v. Thompson*, 255 Ga. 236, 336 S.E.2d 745 (1985), the Petitioner had the right to request a bifurcated trial with the jury hearing evidence first on the questions of negligence and the *propriety* of punitive damages and then reconvening, if necessary, to determine the *amount* of punitive damages to be awarded.[7] Fourth, the Petitioner elected not to pursue its option under *Moore v. Thompson* and as a result was required to try all issues in a unitary proceeding followed by a single jury verdict. Not surprisingly, the Petitioner's strategy in the defense of this case was to deny all liability. Specifically, the Petitioner denied responsibility for the helicopter crash in the Joan Glancy Hospital parking lot by arguing that the sole cause was pilot error.[8] In

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[7] The bifurcated trial procedure is now mandatory for cases involving demands for punitive damages arising after July 1, 1987. O.C.G.A. § 51-12-5.1(d).

[8] In addition, the Petitioner disputed testimony about the Hospital Authority's practice of routing ambulances in emergency situations to its own facilities rather than sending them to closer or more medically appropriate hospitals.

taking this position, the Petitioner dismissed the possibility that punitive damages might be imposed and did not present any evidence relative to the *amount* of such an award. To understand the due process issue raised in this case, it is crucial for the Court to understand the strategic significance of the Petitioner's refusal to request a bifurcated trial and to insist on an all-or-nothing defense. Fifth, in fixing the award of punitive damages, the jury in this case was authorized to evaluate not only the harm actually inflicted by the Petitioner, but also the gravity of the risks created by Petitioner's misconduct. While the additional physical harm to Mr. O'Kelley may have been relatively minor in light of the serious burns that he had already suffered, the jury was aware that two people had died in the helicopter crash and a third escaped without serious injury. If there was any need to underscore the gravity of the risks created by the Petitioner in using the parking lot as a landing area, the two deaths in the helicopter crash graphically provided it.[9]

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[9] Another factor that may have influenced the jury to award $1.3 million dollars in punitive damages was the Hospital Authority's emphasis at trial on Mr. O'Kelley's 1% chance of survival. Though the odds were stacked against him, Mr. O'Kelley did struggle for his life for six days before ultimately dying. The Hospital Authority conveyed a feeling to the jury that Mr. O'Kelley's 1% chance of survival really did not amount to much. The Hospital Authority's cold, rather statistical approach to the tragedy in this case conveyed a callousness on the part of the Hospital Authority that the jury did not and could not overlook. The jury verdict in this case may well have rested on the premise that the Hospital Authority had to

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2. Presentation of Constitutional Issues Below

Apart from the Petitioner's failure to request a bifurcated trial, there is another procedural dimension to this case that bears consideration by the Court. The Petitioner *never* made an evidentiary based challenge to the amount of the jury's punitive damage award. A review of Petitioner's theory of defense will disclose that the constitutional issues raised were part of a general strategy to invalidate Georgia's common law scheme for the award of punitive damages. Prior to trial, Petitioner filed a Motion to Dismiss, or in the Alternative, to Strike Plaintiff's Claim for Exemplary Damages on July 7, 1988. This motion included systemic arguments against punitive damages based on the due process and equal protection clauses of the Fourteenth Amendment and the excessive fines clause of the Eighth Amendment.[10] At trial, the Defendants made an oral motion for directed

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understand more clearly the moral and legal significance of its serious disregard for human life. So viewed, the jury's decision to award punitive damages against the Hospital in this case was a rational decision. Given the loss of life in this episode, the threat to the lives of others and the coldness of the Hospital Authority position before the jury, the award of $1.3 million dollars in punitive damages can be seen as a serious effort on the part of the jury to deter the Hospital Authority from engaging in future misconduct of a similar nature.

[10] Petition for Writ of Certiorari, A-26 to A-29.

verdict and that motion was based on both general evidentiary insufficiency and the constitutional arguments made in the previous motion to dismiss.[11] Prior to the instruction of the jury, Petitioner excepted to the trial judge's proposed charge on punitive damages and stated that the basis for the exception was previously set forth in its motion for a directed verdict which in turn made reference to the pre-trial motion to dismiss.[12] To that point, the only constitutional issues in the case were general, systemic challenges to the system for the award of punitive damages in Georgia. None was linked to the jury verdict in this case because it was yet to be rendered. None of those issues remains in the case.

After trial, the Petitioner filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative for a New Trial.[13] This motion merely repeated the *general* constitutional arguments already made and stated that the verdict and judgment were contrary to both evidence and law and should be set aside. Of great significance to the consideration of the present Petition for Certiorari is the fact that the Petitioner *never* put any countervailing evidence before the jury, attempting to demonstrate, rather than simply assert, excessiveness.

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[11] Petition for Writ of Certiorari, A-32.

[12] Petition for Writ of Certiorari, A-35.

[13] Petition for Writ of Certiorari, A-36 to A-40.

For example, Petitioner could have made an offer of proof on the following: (a) the Hospital Authority's financial condition; (b) any disciplinary action taken against officials responsible for directing the helicopter carrying Mr. O'Kelley to land in the Joan Glancy Hospital parking lot; (c) any post-accident measures implemented to insure that if helicopters were going to land in the Joan Glancy parking lot in the future, there would be a safe area for such landings; (d) any settlements or judgments rendered in favor of the other accident victims in the case, including the two individuals who died, and the amount attributable to punitive damages. This evidence, if it existed, might have persuaded the trial judge that the jury's award of punitive damages was inappropriate. For whatever reason, the Petitioner abandoned the last procedural chance that it had to make an evidence specific challenge to the jury award now under challenge.

REASONS FOR DENIAL OF PETITION FOR CERTIORARI

1. As noted in the Georgia Supreme Court's *original* ruling in this case, the standards governing the award of punitive damages are quite detailed. They may include: (1) the nature and egregiousness of the defendant's conduct; (2) the extent and duration of defendant's wrongdoing and the possibility of its recurrence; (3) the intent of

the defendant committing the wrong; (4) the profitability of the defendant's wrongdoing; (5) the amount of actual damages awarded; (6) previous awards of punitive damages against the defendant; (7) potential or prior criminal sanctions against the defendant based upon the same wrongful acts; and other pertinent circumstances.[14] Finally, the Court indicated that under the Tort Reform Act of 1987, which makes bifurcated trials mandatory, even evidence of the financial circumstances of the defendant might be admissible.[15] It is important to understand that these evidentiary categories illustrate the factors which can be used in Georgia to guide the jury in determining punitive damages in a particular case. In fact, it is fair to say that under Georgia law a defendant can introduce any evidence relevant to the amount of punitive damages. The jury, however, cannot consider any of these factors and a trial judge cannot charge with respect to them unless evidence is presented. Here, the Petitioner's failure to ask for a bifurcated trial and its further failure to present any evidence whatsoever on the amount of punitive damages is highly significant.[16] Respondent

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[14] *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 764 n. 13, 386 S.E.2d 120, 124 n. 13 (1989).

[15] *Id.*

[16] In a bifurcated trial, the burden of persuasion to demonstrate the right to an award of punitive damages rests on the plaintiff. This decision is made by the jury in the first phase of

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views the Petitioner's arguments as an attempt to overcome what would be treated as a procedural default in other circumstances.[17]

2. The Georgia Supreme Court in its first ruling emphasized that the standards for awarding punitive damages under Georgia case law were both *substantively* fair and *procedurally* adequate. In this vein, the Court noted that the jury could not award punitive damages without satisfying a *scienter* requirement; in other words, before a jury could render any punitive damages award in favor of the Plaintiff, the evidence had to show an awareness of the gravity of the risks that a particular course of conduct created.[18] In addition, the Court

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the bifurcated trial. If the jury determines that the award of punitive damages is appropriate in the first phase, it then makes a decision as to the proper amount of punitive damages in the second phase. At that juncture, there is no additional burden of persuasion on the plaintiff. As a practical matter, the defendant must produce some evidence going to amount in order to have any chance of limiting punitive damages. The procedural benefit to the defendant of a bifurcated trial is that it provides an alternative to the all or nothing strategy that is typical of cases where punitive damages are sought and the trial is not bifurcated. Yet, the Petitioner tried the punitive damages issue in this case in a unitary proceeding. Any complaint that the Petitioner has with the verdict in this case cannot fairly be directed at substantive or procedural deficiencies in Georgia law.

[17] *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[18] *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 763, 386 S.E.2d 120, 124 (1989).

reviewed the procedural steps available to a defendant to get relief in the event of an excessive punitive damages verdict.[19] In Georgia, the *trial judge* has considerable discretion to set aside a jury verdict. It is difficult, however, for that discretion to be exercised if the defendant does not give the trial judge an evidentiary predicate for doing so. This is all the more true when the scheme for *appellate* review of jury verdicts is considered. As the Supreme Court of Georgia noted in its original ruling, an appellate court does have the authority to set aside oppressive jury verdicts.[20] It chose not to set aside the punitive damages verdict and explained why. On the record in this case,[21] the Georgia Supreme Court's original decision to uphold the punitive damages verdict of $1.3 million dollars is rational and understandable.

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[19] 259 Ga. at 764-766, 386 S.E.2d at 125-126.

[20] *Id.*

[21] As mentioned earlier, there were two deaths in this accident. In addition the lives of two others, including Mr. O'Kelley, were seriously jeopardized. There was also expert testimony establishing that the Joan Glancy Hospital parking lot was unsafe as a helicopter landing site and that Hospital Authority officials had been aware of that for several years. Finally, after the helicopter crash in this case, there was an incident in the spring of 1988 involving, quite by chance, another burn victim. One of the physicians on duty at Joan Glancy Hospital ordered the helicopter to bring the victim to

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3. For the reasons just discussed, Respondent believes that Georgia's system for the award of punitive damages satisfies all due process requirements set forth in *Haslip*. *Haslip* held that in general the common law system for awarding punitive damages was constitutionally sound. Three elements must coexist for the system to operate in a constitutionally fair manner in a specific case: (a) to withstand a vagueness challenge, the standard for awarding punitive damages in the first instance must be reasonably clear;[22] (b) to meet the requirement of rationality, the factors governing the size of a punitive damages award must be objective in nature and logically related to the purpose underlying punitive damages, which in the case of Georgia is strictly limited to what is necessary to deter future misconduct by the wrongdoer;[23] and (c) to assure factfinding accuracy, the

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Joan Glancy. A police officer who had been present at the scene of the O'Kelley helicopter crash was present in the Joan Glancy emergency room at the time. He and another nurse immediately told the physician that his recommended action should not be taken. But for their intervention, more lives would have been placed at risk.

[22] *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 1044 (1991).

[23] *Id.* 111 S. Ct. at 1045. Under Alabama law, a jury is authorized to award punitive damages for the purposes of both deterrence and retribution. In contrast, under Georgia law punitive damages can only be awarded for the purpose of deterrence and the jury's discretion is specifically directed to return a verdict in an amount appropriate to deter only the defendant in the case. Georgia law does not allow a punitive damages award for the purpose of deterring third parties. O.C.G.A. § 51-12-5.

jury's determination of punitive damages must be procedurally structured so that the ultimate award, if any, genuinely serves the purpose underlying punitive damages.[24]

As Respondent views the litigation of this case on remand, the Hospital Authority did not argue that Georgia's standard for the *imposition* of punitive damages is unconstitutionally vague. Given this Court's discussion in *Haslip* and the Georgia Supreme Court's emphasis on the scienter requirement, the Petitioner's abandonment was realistic. Nor did the Hospital Authority contend that the factors in Georgia relevant to the *amount* of punitive damages were inappropriate. This abandonment likewise was realistic in light of footnote 13 of the original *Jones* ruling. Respondent prepared a chart comparing the factors recognized in Alabama with those in Georgia and presented that chart in oral argument on remand. The chart is set forth below:

Factors Governing the Award of Punitive Damages: Comparison of Alabama and Georgia Standards

Alabama	Georgia
1. Reasonableness of relationship between punitive damages award and harm *likely* to result from D's conduct as well as harm that *actually* occurred?	1. Yes. Jury can consider nature and egregiousness of D's conduct and the amount of actual damages awarded.

[24] 111 S. Ct. at 1045-1046.

Alabama	Georgia
2. Reprehensibility of D's conduct and its duration plus D's awareness of and attempts to conceal conduct.	2. Yes. Jury can consider nature and egregiousness of D's conduct plus its duration and possibility of recurrence.
3. Existence and frequency of similar past conduct.	3. Yes. As part of jury consideration of egregiousness of D's conduct.
4. Profitability to D of wrongful conduct and desirability of removing profit and having D sustain a loss.	4. Yes.
5. Financial position of D.	5. Yes.
6. Total cost of litigation.	6. Not specifically mentioned, but relevant as "other pertinent circumstances". See #9.
7. Imposition of criminal sanctions on D, a factor to be taken in mitigation.	7. Yes.
8. Other civil awards for same conduct, also a factor to be taken in mitigation.	8. Yes. But limited to other punitive damages awards based on same conduct.
	9. Any other pertinent circumstances.
Green Oil Co. v. Hornsby, 539 So.2d 218, 223-224 (Ala. 1989).	*Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 764 n. 13, 386 S.E.2d 120, 124 n. 13 (1989).

It is highly significant that both the Alabama and the Georgia standards for the award of punitive damages rest on a multi-factor approach that gives both sides a full and fair opportunity to develop evidence that is reasonably related to the *amount* of punitive damages to be awarded. It is up to the litigants, however, to decide what evidence they want to bring to the attention of the jury. If a defendant chooses to deny all liability as the Petitioner did in this case, how can it be complained that a constitutional deficiency in the law resulted in an unreasonably large punitive damages verdict? The jury surely cannot be asked, much less required, to consider factors relevant to the award of punitive damages that are not supported in the evidence.

4. Respondent suggests that the Petitioner has acknowledged that Georgia law generally satisfies the due process standards of *Haslip*. On remand, the systemic arguments gave way to the only constitutional issue remaining open to the Petitioner which was a challenge to the size of the jury verdict in this case. Bear in mind here that Petitioner cannot seriously contend that the record lacks evidence to support the award of punitive damages in the first instance. The Petitioner's dilemma is the *absence* of any evidence in the record to contest the $1.3 million dollars award in this case or more particularly to suggest why a different punitive damages award would be more rational. This puts the focus on Petitioner's ratio argument. Petitioner uses it because of its abstractness. It is the only argument that can be made without reference to the evidentiary record in the present case.

The flaw in Petitioner's ratio argument is that it contradicts the Court's basic reasoning in *Haslip*. It seems clear that the Court did not approve Alabama's multi-factor approach to the award of punitive damages at the beginning of the opinion and yet at the end reduce all due process analysis to a single factor test based on the ratio between compensatory and punitive damages. Alabama's scheme for awarding punitive damages clearly permits a jury to award punitive damages based on either the risk of harm created or the harm that actually results from serious risk-creating conduct. Georgia's law in this regard is the same as Alabama's. Respondent would suggest that the relationship between compensatory and punitive damages might provide a reference point for evaluating whether a verdict deters too little or too much in a particular case. But there is nothing in the majority's reasoning in *Haslip* to suggest that it is anything more than a factor in the overall analysis that a jury or a reviewing court is called upon to make.

Of course, the Georgia Supreme Court in its original ruling and again on remand stressed that a comparison between actual and punitive damages is appropriate in some cases, perhaps even decisive.[25] But, in other cases, the comparison was not regarded as helpful. The present case fit into the latter category. The Georgia Supreme Court gave these reasons:

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[25] *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 615, 409 S.E.2d 501, 503 (1991). *See also Colonial Pipeline v. Brown*, 258 Ga. 115, 123, 365 S.E.2d 827 (1988).

> "The actual harm to O'Kelley was slight, but the potential harm to patients in other circumstances supports the punitive damages award here. The purpose of punitive damages, after all, is to deter such conduct. This award, therefore, is consistent both with the nature of the authority's conduct and the potential ensuing injuries. Surely the process is not rendered unconstitutional by permitting the deterrence of potentially dangerous conduct at a point in time when the injury is slight and when only nominal damages may be involved. Society's interest would seem better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided."

To the extent that the *Haslip* decision mentioned the ratio between actual and punitive damages, it did *not* make that comparison a mandatory or dispositive factor in judging the constitutionality of a particular award. Respondent believes that the Georgia Supreme Court faithfully took this dimension of *Haslip* into account and found it to have little utility. Petitioner plainly disagrees but cannot demonstrate that the Georgia Supreme Court decided irrationally (and thus violated due process) in coming to that conclusion.[26]

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[26] For a recent opinion discussing the propriety of allowing a jury to consider both the actual harm inflicted as well as the potential harm threatened in awarding punitive damages, see *Fleming Landfill, Inc., et al. v. Julian Garnes*, ___ S.E.2d ___, 1991 W.L. 258826 (W. Va. Dec. 5, 1991). The West Virginia

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5. As the Georgia Supreme Court noted on remand, Petitioner's argument was limited to "the issue discussed in Division 1", which was the ratio argument. It went on nonetheless to discuss and compare the Alabama and Georgia post-trial procedural schemes. While it found the Alabama post-trial review procedure more structured than Georgia's, it did not see how review under the Alabama approach could have changed the outcome in the present case.

6. In the final analysis, the primary question is whether the Georgia Supreme Court complied with this Court's mandate to reconsider the original *Jones* decision in light of *Haslip*. The response on a reading of the second *Jones* decision must be yes. The Georgia Supreme Court addressed every contention raised by the Petitioner with *Haslip* squarely in view. Petitioner's attempt to make the ratio argument the primary component in the analysis of punitive damage awards does not derive from *Haslip* itself.

The significance of the ratio argument is a matter of public policy on which the states disagree. It is not a substantial constitutional issue for which this Court should establish a bright line rule. If the need to fashion a bright line or single factor due process rule should ever

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Supreme Court in *Fleming* makes specific reference to *Hospital Authority of Gwinnett County v. Jones* and cites it as an example of a case where the life threatening potential of misconduct was sufficient to justify the award of substantial punitive damages.

arise, which is unlikely, this Court can exercise its jurisdiction in a case with a factual record that is fully developed and likely to produce a useful precedent. The present case lacks those characteristics. It also does not present a substantial federal question justifying a place on this Court's oral argument calendar.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

*Albert M. Pearson, III
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5187

James E. Butler, Jr.
Butler, Wooten, Overby, & Cheeley
Resurgens Plaza, Suite 1790
945 East Paces Ferry Rd.
Atlanta, Georgia 30326

Robert D. Cheeley
Butler, Wooten, Overby, & Cheeley
Resurgens Plaza, Suite 1790
945 East Paces Ferry Rd.
Atlanta, Georgia 30326

Attorneys for Respondent
*Counsel of Record

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IN THE SUPREME COURT OF GEORGIA

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d/b/a GWINNETT AMBULANCE SERVICES,	)	CASE NO. 46956
Appellant,	)	
v.	)	
R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,	)	
Appellee.	)	

BRIEF OF APPELLANT ON REMAND

This is the second appearance of this case in this Court. See *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989). Following that decision, the Hospital Authority petitioned the United States Supreme Court for certiorari to review the $1.3 million punitive damage award entered by the jury against the Authority, and approved by this Court.

On March 4, 1991, the U.S. Supreme Court decided a long awaited punitive damages/due process case from Alabama, Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___ (59 U.S.L.W. 4157).

On March 18, 1991, that Court entered an order in this case as follows:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of Pacific Mutual

Life Insurance Company v. Haslip, 499 U.S. ___ (1991).

A copy of the *Pacific Mutual* opinion is attached hereto for convenience.

This case is now "ripe" for such further consideration.

In this case the Court will recall that William H. O'Kelley was mortally burned in a head-on car/truck collision in Gwinnett County. A helicopter was called to transport O'Kelley.

The senior EMT in charge at the scene, Ms. Beth Burgess, was an employee of Gwinnett Ambulance Services operated by the Hospital Authority of Gwinnett County. Mr. O'Kelley was placed in an ambulance, where Ms. Burgess examined his burns. After she attempted unsuccessfully to begin an IV, she decided to transport Mr. O'Kelley to the closest hospital, Joan Glancy Hospital (operated by the Hospital Authority) (T. 317-318).

While the helicopter was in route to the accident site, the supervisor of Gwinnett Ambulance Services directed the emergency technicians at the scene to transport the patient to Joan Glancy Hospital, which was less than two miles from the accident scene (T. 15), and had on staff two physicians with significant training and experience in treating burn patients. One of these physicians, Dr. Gaskins, who was monitoring EMT radio transmissions, agreed with the decision to transport the patient to Joan Glancy (T. 549).

The helicopter was still about two to three minutes away when the ambulance left the scene. The trip to the

hospital by ambulance took about four minutes (T. 81, 91). The helicopter proceeded to Joan Glancy Hospital, where it landed safely in the parking lot.

Plaintiff introduced the testimony of a Gwinnett Fire Department dispatcher who testified to instances when an emergency patient was not taken to the nearest hospital (as was done here) but instead to one of the Hospital Authority's institutions. He further testified that the reason for bypassing nearer hospitals was to "provide more services to the county."

At the Joan Glancy emergency room, Mr. O'Kelley was treated and stabilized by Drs. Gaskins and Mason (the two experienced physicians referred to above), by the establishment of IV lines which the EMT had been unsuccessful in starting in the ambulance, administration of morphine, and placement of a respiratory tube in the patient's throat after he complained of shortness of breath about an hour after reaching the hospital.

Due to the severity of his injuries, the patient's chances of survival were about 1%. After being examined and x-rayed for the possibility of other injuries, about an hour and a half after arriving O'Kelley was strapped into a stretcher and loaded onto the helicopter, which was owned by a co-defendant, for evacuation to a "burn unit", one which specializes in severely burned patients.

On lift-off from the hospital parking lot, the co-defendant's helicopter hit a light pole and crashed. Experts testified at trial that the accident was caused by "gross pilot error" (259 Ga. at 760), not only for flying into the pole, but also because the water/alcohol tank, which may

have been necessary to give added power to the helicopter engine for assent from such a confined space, was empty (Id.).

Incredibly, O'Kelley was only slightly injured, if at all, in the helicopter crash. After being re-examined at Joan Glancy emergency room, O'Kelley was then transported by ambulance to Grady Hospital, where he died six days later was the result of his burns. The bill for services from Joan Glancy Hospital was $1,216.26.

The Administrator of O'Kelley's estate sued the owner of the helicopter and the Hospital Authority for nominal and punitive damages. No claim for actual damages for personal injury or wrongful death was asserted. The driver of the car which caused the head-on collision and her employer were also sued in separate suits (one of which is still pending).

Plaintiff's counsel contended that punitive damages were warranted because the Hospital Authority allegedly was motivated by profit, rather than patient care, in taking Mr. O'Kelley to one of its hospitals, and the Hospital Authority failed to maintain a proper helicopter landing area. In its earlier opinion, however, this Court observed that generally punitive damages are not authorized for non-performance of a duty and did not base its decision on the alleged failure to provide a proper landing area (259 Ga. at 761, n. 7).

The jury awarded O'Kelley's estate nominal damages of $5,001 against the Hospital Authority and the helicopter owner, jointly. However, the jury awarded punitive damages of $5,000 against the owner of the helicopter and $1.3 million against the Hospital Authority.

This Court affirmed, but that judgment has been vacated and the case has been remanded for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip,* supra.

In *Pacific Mutual,* the Supreme Court described the common law method for assessing punitive damages as follows (59 U.S.L.W. at 4160-4161):

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

The Court concluded that the common-law method for assessing punitive damages is not so inherently unfair as to deny due process and be per se unconstitutional (59 U.S.L.W. at 4161).

Nevertheless, an award of punitive damages in a particular case may violate due process (59 U.S.L.W. at 4161). The Court then proceeded to consider whether the punitive award in that case violated due process. It concluded that under the procedures utilized in Alabama, that award did not violate due process.

Of crucial significance here, however, the Supreme Court found that "The Alabama Supreme Court's post-verdict review ensures that punitive damages awards . . . have some understandable relationship to compensatory damages" (59 U.S.L.W. at 4162).

Unlike Alabama, Georgia's post-verdict review does not ensure that punitive damages awards have some

understandable relationship to compensatory damages. On the contrary, in its prior opinion in this case this Court acknowledged that "this award appears to bear no rational relationship to the extent of the injury . . . ", saying that lack of such rational relationship was of "no consequence", and holding that the "concept of proportionality as a legal limitation on the amount of punitive damages" is inapplicable in Georgia when such damages are awarded for deterrence (259 Ga. at 762).

The U.S. Supreme Court, on the other hand, has now held that punitive damages awards, even those entered for deterrence, must have some understandable relationship to compensatory damages (59 U.S.L.W. 4162).

Because both the trial court (R. 263) and this Court have found that the $1.3 million punitive damages award in this case bears no rational relationship to the compensatory damages ($5,001 in nominal damages, if nominal damages be compensatory), those punitive damages should be disallowed.

It would appear that there has been intra-court disagreement on the question of whether there must be a relationship between punitive damages and compensatory damages. In *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988), in an opinion written by Presiding Justice Smith, a $5 million punitive award was found to be excessive because, inter alia, the award did not bear a rational relationship to the actual damages and there was no rational relationship between the offense and the punishment, in that the punitive damage award was 100 times the actual damages (258 Ga. at 123). In

writing for the Court in this case, Justice Hunt distinguished the *Colonial Pipeline* requirement of proportionality.

Later, in *WMH, Inc. v. Thomas*, 260 Ga. 654, ___ S.E.2d ___ (1990), in another opinion by Presiding Justice Smith, the Court set aside the punitive award finding that there was " . . . no rational relationship between the alleged offense and the punishment in that the punitive damage award was almost 400 times the actual damage award of $3,200.00" (260 Ga. at 656). Justice Hunt dissented in *WMH*, saying at one point that "The absence of a discernable relationship between the amount of actual damages and the amount of punitive damages does not necessarily invalidate the latter", citing the earlier decision of this Court in this case.

These different views have now been addressed by the U.S. Supreme Court. Punitive damages awards must have some understandable relationship to compensatory damages (59 U.S.L.W. at 4162). There is no understandable relationship between $1.3 million in punitive damages and $5,001 in nominal damages. The punitive damages awarded against the Hospital Authority are more than 250 times the nominal damages awarded to Mr. O'Kelley's estate (and more than 500 times the nominal damages to be paid by the Authority).

As the United States Supreme Court noted in *Pacific Mutual*, the ratio there, 4.2 to 1, "may be close to the line" (59 U.S.L.W. at 4163). Certainly, 250 to 1 (or 500 to 1) is over the line, and $1.3 million in punitive damages is unconstitutional.

Although this Court recognizes that an "inordinately large deterrence award" may reflect undue passion and prejudice (259 Ga. at 762, n. 9), without a proportionality requirement Georgia has no means for determining which deterrence awards are "inordinately large", other than each Justice's opinion as to what is "large" and what is "inordinate".

The debate over punitive damages is as old as punitive damages themselves. The Supreme Court's decision in *Pacific Mutual v. Haslip* has not resolved the problem; it has prolonged it. Now is the time for this Court to adopt procedures for use by the trial courts (and the Court of Appeals) for reviewing punitive damages awards similar to those adopted in Alabama and approved by the Supreme Court in *Pacific Mutual v. Haslip*.

At a minimum, the Court should set aside the $1.3 million punitive award in this case as being a taking of property without due process of law.

Respectfully submitted,

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD

By: /s/ Harold N. Hill, Jr.
Harold N. Hill, Jr.
Georgia Bar No. 353900

Suite 1400
999 Peachtree Street, N.E.
Atlanta, Georgie 30309-3999
(404) 870-6000

LONG, WEINBERG, ANSLEY &
WHEELER

By: /s/ Meade Burns by HN Hill
Meade Burns
Georgia Bar No. 097000
Milton B. Satcher
Georgia Bar No. 626888

Attorneys for Appellant

999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

IN THE SUPREME COURT OF GEORGIA

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d/b/a GWINNETT AMBULANCE SERVICES,	)	CASE NO. 46956
Appellant,	)	
v.	)	
R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,	)	
Appellee.	)	

SUPPLEMENTAL BRIEF OF THE HOSPITAL AUTHORITY OF GWINNETT COUNTY

At oral argument, Justice Hunt asked counsel for The Hospital Authority of Gwinnett County a question substantially as follows:

> Under your view will a comparison between compensatory and punitive damages have to be made in every case in which punitives are awarded?

The purpose of this supplemental brief is to address that question more fully than was done at oral argument.

In our view the U.S. Supreme Court's requirement announced in *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991), that post-verdict review must ensure "that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"

(111 S.Ct. at 1045) will be necessary in all cases in which punitive damages are awarded *and* in which the defendant assessed with such damages timely raises the due process/taking question in the trial court. It can be expected that, in the normal course of things, a sizable punitive award would be required to "trigger" the due process challenge.

On the other hand, the frequency with which such challenges can be expected should be reduced by the $250,000 "cap" on punitive damages imposed in many instances by the Tort Reform Act of 1987. O.C.G.A. § 51-12-5.1(g).

However, the workload of this Court will not be adversely impacted because once Georgia's scheme for imposing punitive damages has been made to conform to *Haslip*, future challenges to individual punitive damages verdicts will go to the Court of Appeals.

Insofar as the instant case is concerned, the Court may see fit to disapprove, based on *Haslip*, the dicta in *Foster v. Sikes*, 202 Ga. 122, 126, 42 SE2d 441 (1947), and its progeny, that nominal damages will support a punitive damages award. This may be preferable to trying to articulate a relationship between nominal damages (which invariably are in token amounts) and punitive damages.

Respectfully submitted,

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD

By: /s/ Harold N. Hill, Jr.
Harold N. Hill, Jr.
Georgia Bar No. 353900

Suite 1400
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

LONG, WEINBERG, ANSLEY &
WHEELER

By: Meade Burns by HN Hill
Meade Burns
Georgia Bar No. 097000
Milton B. Satcher
Georgia Bar No. 626888

Attorneys for Appellant

999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

(3)

No. 91-1047

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In The Supreme Court
OF THE
United States

OCTOBER TERM, 1991

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
Individually and d/b/a
GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate
of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

REPLY BRIEF FOR THE PETITIONER

* HAROLD N. HILL, JR.
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
Suite 1400
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Petitioner

* Counsel of Record

Of Counsel:

MEADE BURNS
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

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No. 91-1047

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OCTOBER TERM, 1991

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
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Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate
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Respondent.

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REPLY BRIEF FOR THE PETITIONER

Respondent would have the Court focus on the second Question Presented by Petitioner rather than on the first, namely, whether the Supreme Court of Georgia has complied with the mandate of this Court to reconsider its decision in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. (1991). It is clear that the Georgia court did not comply with that mandate; it plainly said it disagreed with this Court's *Haslip* decision (A. 2-4). Even so, the Court has jurisdiction of and should, we submit, consider both Questions Presented.

Status of Proceedings

In the appearance last year of this case, *Hospital Authority of Gwinnett County, Georgia v. Stanford Jones*, No. 89-1315, 499 U.S. (1991), Petitioner raised, *inter alia*, the question of whether O.C.G.A. (Official Code of Georgia Annotated) § 51-12-5 authorizing punitive damages violated Petitioner's rights to due process and equal protection.

Following decision of *Pacific Mutual Life Ins. Co. v. Haslip, supra*, the Court remanded this case for further consideration in light of *Haslip*. The Georgia Supreme Court nevertheless reaffirmed the punitive damage award (A. 1-5). The editors of U.S. Law Week characterized the Georgia decision as follows: "Georgia Court Gives Slight Regard to *Haslip* Punitive Damages Guidelines". 60 U.S.L.W. 1070 (1991).[1] (The Supreme Court of Appeals of West Virginia has disagreed with Georgia's interpretation of *Haslip*, saying: "We believe that *Haslip* offers more than mere platitudes...." *Fleming Landfill, Inc. v. Garnes*, 1991 W.Va. Lexis 215, S.E.2d (1991).)

Jurisdiction

In the Brief in Opposition (pp. 1-3), Respondent argues, without citation of authority, that when the Court remanded this case to the Georgia court for further consideration in light of *Haslip*, the Court lost jurisdiction of the due process and equal protection challenges to O.C.G.A. § 51-12-5 raised in Petitioner's earlier Petition for Certiorari, *Hospital Authority of Gwinnett County, Georgia v. Jones*, No. 89-1315, *supra*, which issues now appear as the second of the pending Questions Presented.

Respondent urges as the reason for adopting such a rule that the state courts should first be afforded an opportunity to consider federal questions (Brief in Oppo-

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[1] Even Respondent recognizes that the Supreme Court of Georgia found *Haslip* "to have little utility". Brief in Opposition, p. 18.

sition, p. 3, n. 5). The Georgia Supreme Court has been afforded such opportunity and has held, erroneously we submit, O.C.G.A. § 51-12-5 to be constitutional (A. 12-17). The supposed reason for the rule advocated by Respondent fails to justify such a rule.[2]

Petitioner respectfully submits, albeit also without direct authority, that, following remand, reconsideration, reaffirmance and renewal of a Petition for Certiorari, so long as the Court can deny certiorari of renewed grounds there is no reason for the Court to declare itself to be without jurisdiction of issues raised earlier and not decided by the Court when it granted certiorari and remanded for reconsideration. Compare *Hathorn v. Lovorn*, 457 U.S. 255, 261-262 (1982).

In the case at bar there are numerous valid reasons for the Court to consider those punitive damages issues raised in this case earlier and not decided by *Haslip*. Therefore, Respondent's effort to restrict the Court's power of review should not be allowed to succeed.

Statement of the Case

Respondent argues that punitive damages were authorized here because Petitioner's parking lot was unsafe for helicopter landings (Brief in Opposition, pp. 5, 6, 12, n. 21). An unsafe landing area would at least have provided a proximate cause for the helicopter crash (see the Georgia court's "but for" analysis at A. 11). However, the Georgia Supreme Court expressly refused to justify the award of punitive damages on this basis (A. 11, n. 7). Respondent's efforts to sustain the award on this rejected

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[2] Respondent also makes a waiver argument (Brief in Opposition, pp. 2-3, 14) because Petitioner did not attempt to reargue the invalidity of O.C.G.A. § 51-12-5 on remand. The Georgia court would have "come over the bench" had we attempted to reargue matters it had previously decided (A. 12-17) and which this Court did not remand.

"inadequate heliport" basis should not be allowed to prevail.

Argument

Respondent urges that Petitioner failed to offer evidence showing excessiveness (Brief in Opposition, pp. 6-9), but this contention hides two fallacies. First, the Supreme Court of Georgia did not, upon remand, itself remand to the trial court for hearing and the presentation of evidence as to excessiveness in light of the factors set forth in *Haslip*. Instead, it found that, notwithstanding *Haslip*, post trial review of punitive damages by trial and appellate courts "would be entirely a matter of conjecture" or of "opinion based upon extraneous factors" (A. 4).

Second, Respondent is arguing that the burden of limiting punitive damages is on the defendant (Petitioner here) (Brief in Opposition, p. 11, n. 16). On the contrary, like entitlement, the burden of proving the amount of recoverable punitive damages is on the plaintiff (Respondent here), as is true for all other damages.

Respondent's reliance upon a supposed "scienter requirement" (Brief in Opposition, pp. 11, 14) to supply notice of the prohibited conduct is misplaced on its face, just as was the Georgia court's reliance thereon (A. 13). There is no scienter requirement in showing an "entire want of care", the basis on which punitive damages were awarded here (A. 13).

Respondent urges that Georgia has detailed standards governing awards of punitive damages comparable to the *Green Oil* standards applicable in Alabama. *Haslip*, 111 S.Ct. at 1045 (Brief in Opposition, pp. 9-10, 14-15). To support this argument, Respondent cites a suggested jury instruction first recommended by the Georgia court in this very case (A. 14-15, n. 13) which had not been given in charge by the trial court (A. 33-34) and which instruc-

tion was not used by the Supreme Court of Georgia in upholding the punitive damages award entered here.

The fact of the matter is that the Supreme Court of Georgia continues to accord unjustifiable deference to excessive verdicts unless the award is so excessive as to "shock the judicial conscience" (A. 17). Compare the similar Mississippi standard criticized in *Pacific Mutual Life v. Haslip, supra*, 111 S.Ct. 1032, 1045, n. 10.

Conclusion

Respondent asserts that ". . . in fixing the award of punitive damages, the jury in this case was authorized to evaluate not only the harm actually inflicted by the Petitioner [which was, at most, "nominal"], but also the gravity of the risks created by Petitioner's misconduct." Brief in Opposition, p. 6 (matter in brackets added). That is the issue being raised, because in *Haslip* the Court held that punitive damages must ". . . have some understandable relationship to compensatory damages," 111 S.Ct. at 1045, not a relationship to "likely harm" as in Alabama, 111 S.Ct. at 1045. Let the helicopter occupants injured in the crash collect punitive damages if allowable, not someone who suffered no injury.

Here, Mr. O'Kelley, who was "only slightly injured" in the crash (A. 8), was awarded nominal damages, plus $1.3 million in punitive damages. That award should have been disallowed by the Georgia courts. *Haslip, supra.* A jury's evaluation of "likely harm" creates no standard at all. Respondent may consider this approach "cold" (Brief in Opposition, pp. 6-7, n. 9), but it is the law, *Haslip, supra,* which the Supreme Court of Georgia chose not to

apply. The petition for certiorari should, we submit, be granted.

February 14, 1992

Respectfully submitted,

*By: /s/ HAROLD N. HILL, JR.
Harold N. Hill, Jr.

Attorneys for Petitioner
* Counsel of Record

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Of Counsel:

MEADE BURNS
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700